IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

JOHN W. JOHNSON, et al,
Appellants.
—vs—
NORTH STAR LUMBER COMPANY, a corporation,
Respondent.

BRIEF OF APPELLANT

MORGAN & BREWER,
Hoquiam, Wash.
JOHN VAN ZANTE,
Spalding Building, Portland, Oregon,
Solicitors for Appellant.

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STATEMENT OF THE CASE.

This is a suit to remove a cloud from title to certain real property in the State of Oregon; the Respondent, the plaintiff below, is a citizen of the State of Minnesota; the Appellant, John W. Johnson, and the defendants, Herman Winters and John Winters, are citizens of the State of Washington; none of the parties to the action are citizens of the State of Oregon. The land in question is vacant, unoccupied land and is not in possession of either parties to the suit, or any other person. Both parties deraign title

through Aaron Johnson. The plaintiff, respondent here, by deed from Aaron Johnson to Andrew Johnson of date May 24th, 1904, recorded June 7th, 1904; deed from Andrew Johnson to Aaron Johnson of date, April 8th, 1907, delivered April 12th and recorder on the 24th of the same month; a deed from Aaron to respondent of date February 21st, 1907, delivered April 12th (Record 58-61) and recorded April 24th, 1907; The defendant claims through a sheriff's deed made in pursuance of sale under an execution issued on a judgment recovered in the State Court by defendant against Aaron Johnson, a non-resident of the State, in an action at law commenced on April 1st, 1907, and the attachment of property in suit as the property of Aaron Johnson, and the subsequent service of summons upon him by publication. It will be observed that Aaron Johnson had previously deeded to the North Star Lumber Company, on the 21st day of February, 1907, and that he afterward received the title from Andrew Johnson by deed of April 8th, 1907, both of which deeds were delivered April 12th and recorded April 24th, 1907, or twenty-four days after the attachment of property involved in this suit.

The plaintiff below brought this suit to quiet title, alleging defects and informalities in the attachment proceeding in the Oregon State Court. The appellants promptly challenged the jurisdiction of the Court, and the sufficiency of the allegations of the bill on the ground that the Federal Courts would not examine into the records of the Oregon State

Court for defects and informalities in that record. After the appellant's exceptions to the bill and to the jurisdiction of the Court had been overruled, the appellant answered and set up affirmatively the record in the State Court. At the close of the plaintiff's testimony the appellant again challenged the jurisdiction of the Court and the sufficiency of the proof upon the grounds mentioned. The plaintiff had by way of proof, put in evidence the deeds showing his title, and the record of the State Court and based his right to recover solely upon the defects and informalities of that record. It seems to be conceded that if the informalities in the Oregon Record will not be inquired into, or if they are insufficient to invalidate the Oregon judgment, then the respondent is not entitled to have its title quieted.

There is no such diversity of citizenship in this action as will authorize the trial court to take jurisdiction by reason of diversity alone, the respondent being a citizen of Minnesota and the appellant and defendants, citizens of the State of Washington. The jurisdiction of the trial court rests entirely upon the grounds that the property, title to which is to be quieted, is within the State of Oregon. We mention this fact in view of the trial court's statement on Page 48 of the record, where he says: (referring to the jurisdiction of the trial court)

> "But it has jurisdiction to entertain a bill to quiet title to real property or remove a cloud

therefrom where the requisite diversity of citizenship exists."

The particular defect in the record of the Oregon Court, relied upon by the respondent and found by the trial court to be the fatal defect, was the fact that an affidavit, otherwise regular, for publication of summons, made by John W. Johnson, the plaintiff in the Oregon Court, was taken within the State of Washington and before a Washington notary public. The affidavit referred to is shown by the record in this cause on Pages 84, 85 and 86, and the particular complaint as to this affidavit is founded upon the statute of Oregon, then in force (since amended), (Sec. 819, B & C An. Laws) which required an affidavit taken in another State, before it could be used, must be certified by Commissioner appointed by the Governor to take depositions and affidavits in such State,or by court having a seal and clerk. The various steps of the Oregon Court, in the action begun by appellant here and through which he acquired his title, were as follows:

The plaintiff in the State Court, John W. Johnson, the appellant here, commenced an action in the Oregon Court upon the first day of April, 1907, against Aaron Johnson and Eline Engebritson. His petition was filed in the Circuit Court of the State of Oregon for Douglas County on this day. (Pages 69 to 71 of record). Affidavit for attachment was made and filed on this day. (Pages 72 and 73). Bond for at-

tachment was filed on the same day. Levy and seizure under attachment was made by Sheriff of Douglas County on this day. Summons was issued and placed in the hands of the sheriff on this day, and return "not found" made May 8th, 1907. Writ of Attachment was issued by Clerk of Court on said April 1st, 1907, and Writ filed May 8th, 1907, showing levy on the first day of April, 1907. On the 20th of May, 1907 an order was made continuing the cause for service. (Pages 81 and 82 of Record). On the 9th day of September, 1907, the plaintiff through his attorneys made a motion for service of summons by publication (Page 82) and supported such motion by two affidavits, one of O. P. Coshow, made in Oregon, regular in all respects, and the other the affidavit of John W. Johnson, made in Washington made before Chas. W. Hodgdon, a Washington Notary Public, the same being the defective affidavit which the respondent relies upon to invalidate the Oregon Judgment. (Pages 82, 83, 84, 85 and 86 of Record). On the same day G. W. Wonacott, County Judge for Douglas County, Oregon, made an order for the publication of summons but as we understand it, no publication was made upon this order. On the 11th day of October, the plaintiff, through his attorneys, Coshow & Rice, made a second motion for an order for the publication of summons, and this was supported by affidavit of O. P. Coshow as to the non-residence of the defendants, and by affidavit of Evelyn Johnson, both of which affidavits were made in Oregon and were regular, in support of such

motion for publication; Thereupon the Oregon Court made the following order:

> "It appearing **to the satisfaction of the Court** that neither of the Defendants above named can be found within the State of Oregon, and that a cause of action exists against both of said Defendants and that both of said Defendants are proper parties to the above entitled action; and it appearing to the satisfaction of the Court that the postoffice address of neither of the Defendants is known and cannot be found with reasonable diligence, it is
>
> ORDERED that both of said Defendants be served with Summons by publication in the Roseburg Review for a period of six successive weeks. Dated this 11th day of October, 1907.
>
> **J. W. Hamilton,**
> Judge of said Court."

(Stipulation on Page 66 of the record shows this Order which appears unsigned on Page 95 of Record to have been in fact signed.)

Thereafter proceedings were had in the Oregon Court whereby the cause proceeded regularly to judgment, foreclosure and sale, and deed to this appellant. As before pointed out the only defect in the Oregon Record was the making of the affidavit of John W. Johnson before a Washington Notary Public.

The Trial Court in this suit took the view that it would examine into the Oregon record, search out this defective affidavit and set aside the Oregon judgment. And this is the sole issue in this case at this time. As we have said, it seems to be conceded that the Oregon record is proof against attack except as to this affidavit and that, unless the decision of the trial court in this suit holding such affidivat to be defective, and that the Federal Court will search out such defect, is correct, and is sustained, then title is in appellant and the respondent's suit must fail.

It will be evident from what has been said and the fact is, that this suit is brought for the sole purpose of overturning the decision of the Oregon Court; it has no other purpose. (Bill of Complaint, Record Page 1-6). Its sole purpose is a review of the judgment of the Oregon Court in another forum and without the formalities of an appeal. It is also evident these defects are to be tested and were tested solely by an examination of the record. It does not appear why this action was not brought in the State Court. The Circuit Court of Douglas County, Oregon, was open to the plaintiff in a suit to quiet their title and was open to them by way of an appeal from or modification of judgment of the Circuit Court of Oregon. Neither of these methods were adopted, but rather this citizen of Minnesota proceeded against these citizens of Washington in the United States Circuit Court for Oregon in a suit whose sole purpose

is to overturn the judgment and decree of the Oregon Court.

ASSIGNMENTS OF ERROR.

First: The Court erred in overruling the defendant's exception to the original bill of complaint for impertimence, for this, that the trial court was without jurisdiction to examine into the record of the Oregon Court in this collateral proceeding.

Second: The Court erred in overruling like exceptions to the amended bill of complaint of the plaintiff.

Third: The Court erred in holding that the requisite diversity of citizenship existed to entitle the Court to entertain jursidiction, for this, that the plaintiff is a citizen of Minnesota, and the defendants are citizens of the State of Washington.

Fourth: The Court erred in authorizing this collateral attack upon the judgment of the Oregon Court and in holding that such judgment was open to collateral attack in this proceeding, for this, that while the Court and counsel concedes that the property was regularly seized by a court of competent and general jurisdiction which proceeded to judgment and sale, this Court would examine into the record of the Oregon Court and would hold that the Oregon judgment was void because one of the affidavits on which publication was made by plaintiff,

was made before a Washington Notary Public, (this being one of several affidavits), and that therefore, this Court could and would set aside the judgment of the Circuit Court of Oregon.

Fifth: The court erred in holding that the affidavat of publication made by plaintiff before the Washington Notary Public, was an essential requisite to a valid order by the Circuit Court of Oregon for a publication of summons, for this, that 1st, the Federal Courts will not investigate the record of a state court of general jurisdiction for defects and informalities, and 2nd, the presumptions are in favor of the judgment of the State Court, and the trial court was not authorized in assuming that the state court based its order entirely upon the defective affidavit made before the Washington Notary Public, and ignoring the sheriff's return "not found", and the other affidavits found in the record of the Oregon Court.

Sixth: The Court erred in finding in this collateral proceeding, that the affidavit, made before the Washington Notary Public, was a mere nullity, that an essential step was entirely omitted and that the order of publication, based thereon, was ineffectual for any purpose.

Seventh: The Court erred in entertaining this collateral attack upon the judgment of the circuit court of Oregon, where the order for publication of summons recited, as it did in this case, that it appeared

to the "satisfaction of the Court", that the defendants in that case were not residents of the State of Oregon, especially where the record shows other affidavits than the defective one, which the Court calls a nullity, were on file in said cause, and the Court erred in finding that an essential step was in fact entirely omitted, in view of the other affidavits on file before the Oregon Court, the sheriff's return, and the solemn finding of the Oregon Court.

Eighth: The Court erred in holding that the judgment of the Oregon Court was void, for two reasons, 1st, that the trial court should not, under the law with reference to federal courts, have entertained this collateral attack on such judgment, and 2nd, for the reason that the judgment was not, in fact, void, and would not have been so held by the state court in case of a direct attack.

Ninth: The Court erred in finding that the plaintiff was the owner in fee of the property involved in the action, and in holding that the defendant, John W. Johnson, was not such owner, and in quieting the title in favor of the said North Star Lumber Company, and against the said John W. Johnson.

Tenth: The Court erred in ordering that the deed, bearing date of the 20th day of November, 1909, executed by the sheriff of Douglas County to the defendant, John W. Johnson, be cancelled and held for nullity.

Eleventh: The Court erred in entering its decree for the plaintiff and against the defendant, John W. Johnson, quieting the title for the plaintiff and as against the defendant, John W. Johnson.

WHEREFORE, The defendant prays that the said decree be reversed, and the circuit court be directed to dismiss the bill for want of equity in the plaintiff as against the defendant.

ARGUMENT AND AUTHORITIES

The issues therefore, it seems to us, in this case are limited to these four questions which we state in the affirmative.

1st: The federal court will not in this proceeding search the record of the Oregon State Court for defects and informalities or errors apparent upon and judged by the face of the record.

2d: The attachment of real property and its subsequent sale under a judgment of the state court will give the state court jurisdiction which will not be attacked in a collateral proceeding in the Federal court.

3d: Where the court makes a solemn finding, that it appears to its satisfaction, that the defendant cannot be found within the state, and makes an order of publication of summons,

such finding is proof against collateral attack.

4th: There was sufficient showing in this case to justify the Oregon Court in its finding, that it appeared to the satisfaction of the Court that the defendant could not be found within the State of Oregon.

The several assignments of error all go to these questions and counsel will, with leave of Court, discuss these questions rather than the assignments.

The Federal Court will not in this proceeding search the record of the Oregon State Court for defects and informalities or errors apparent upon and judged by the face of the record.

The Honorable Trial Court took the view that because this action was a suit to quiet title, he would search the Oregon record for defects. He says, (Record Page 48):

> "It may be conceded that a Federal Court has not jurisdiction at the suit of a party to vacate or annul a judgment or decree of a State Court for error or irregularity appearing on the face of the record. (Citing Nat'l Surety Co. vs. State Bank, 120 Fed. 593). But it has jurisdiction to entertain a bill to quiet title to real property or to remove a cloud therefrom where the requisite diversity of citizenship exists.

> This has been, from time immemorial, one of the well known functions of a court of equity where the remedy at law was inadequate and in such a suit the court may enquire into the jurisdiction of a State Court to render a judgment or decree which is relied upon and brought before the court by a party claiming the benefit thereof."

It is apparent, therefore, that the trial court took the view that an action to quiet title stood in a different relation than other suits. In this we submit that the trial court was in error. This identical question was before the Circuit Court of Appeals for the Eighth Circuit, in the case of Little Rock Junction Railway vs. Burke, 66 Fed. Page 83. This was an action to quiet title, brought by John Burke, the appellee, against the Railway Company. The bill averred, in substance, that the Railway Company was in possession of the property under a sale under a judgment, which was claimed to be void, and was, in fact, void, as shown on the face of the record, for the reason that the Arkansas Court never acquired jurisdiction over the appellee. The case seems to be on all fours with the one at bar. In that case, the Eighth Circuit, by Judge Thayer, says:

> "It is manifest from an examination of the record in the case at bar that the Circuit Court found and decided that the decree of the Pulaski Chancery Court condemning the land in controversy to be sold for the non-payment of taxes

was utterly void for want of jurisdiction; and that issue as to the validity of the decree of the Chancery court appears to have been tried and determined by the Circuit Court solely upon an inspection of the record in the tax suit. No evidence seems to have been offered for the purpose of impeaching the decree in question, except the record in the suit to foreclose the tax lien."

The facts are similiar here,

Continuing:

"We think, therefore, that it may be accepted as a general rule, in the absence of any statutory provisions on the subject, that the proper forum in which to seek relief, otherwise than by an appeal or writ of error, against a judgment or decree which is alleged to be void on the face of the record, is in the Court by which such judgment or decree was rendered, and that other Courts of co-ordinate jurisdiction have no authority to grant relief in such cases. But, whatever may be the correct rule in this respect as between State Courts of equal authority, it is manifestly true, we think, that, owing to the peculiar relations which exist between State and Federal Courts of co-ordinate jurisdiction, the Federal Circuit Court ought not to review, modify, or annul a judgment or decree of a State Court, unless such review is sought on a

state of facts not disclosed by the record of the State Court, which, for that reason, has not undergone judicial examination. The sufficiency of the service, whether by publication, or otherwise, to support a final adjudication, and every other matter apparent upon the face of the record, are supposed to have received due consideration by the Court rendering a judgment or decree before the same was entered. Therefore, when a suit is instituted to nullify a decree for matters disclosed by the record, and for no other reason, the proceeding is not a new suit, but is essentially in the nature either of an appeal from the original adjudication or a bill of review. The Federal Courts should remit proceedings such as these to the judicial tribunal of the State which made the record that is to be reviewed or impeached."

Continuing:

"Forasmuch, then, as the injury complained of was subject to redress in the modes above indicated, we are constrained to hold that the Federal Court ought not to have intervened, as it did, notwithstanding the fact that the decree complained of had already been executed. The Federal Circuit Courts sitting in equity have an undoubted right, in certain cases, to entertain a bill to quiet title or to remove a cloud upon a title, for this has been from time immemorial one of the well-known functions of a court of equity."

Continuing:

"But we think that this jurisdiction does not extend, and ought not to be extended, to cases where the cloud upon the title consists of a judgment or decree of a State Court, and proceedings that have been taken in execution of the same, which are alleged to be utterly void, and on that account require the introduction of no evidence to establish their invalidity other than the record of the State Court. Because the Federal Courts have power to entertain a bill to quiet title, it does not follow that, under the guise of administering such relief, they will review the proceedings of a State Court, and vacate the judgment of a State Court which is obviously void when tested by the record, or that they will undo what may have been done by virtue of proceedings taken under such a judgment, so long as it is possible for the complainants to have such judgment and the proceedings taken thereunder vacated by a proper application addressed to the State Court. For these reasons, our conclusion is that the facts proven at the trial were not of such a character as are essential to support an original bill in the Federal Courts."

This case has been referred to in a number of cases.

United States vs. Andersen,
169 Federal, 201.

Union Pacific Railway Co. vs.
Flynn, 180 Federal, 565.

This case has also received special consideration at the hands of this Court, speaking by Judge Morrow, in the case of Blythe vs. Hinckley, 84 Federal, 247. This case involved the question as to whether or not, in a suit in equity, where it was claimed that a probate proceeding in the courts of California was void, the Federal Courts would entertain a suit to quiet title where the sole question was a review of the California Courts for defects in its proceeding. In that case, the whole question as to the jurisdiction of Federal Courts was discussed at length by this Court, and this Court said:

> "These cases clearly establish the doctrine that the courts of the United States will not take jurisdiction of a case to correct an error appearing on the face of the record in a judgment rendered in a State Court, nor will they take jurisdiction of a case the object of which is to set aside a judgment of a State Court void upon its face. Now, if we examine the present bill, we find that the latter object is its substantial scope and purpose; and, to accomplish this object, there is set forth, with great particularity, the record and proceedings in the Superior and Supreme Courts of the State in a controversy between the same parties, concerning the same subject-matter."
>
> Blyth vs. Hinckley, 84 Federal, 255.

And so in this case. The plaintiff's testimony consists of five exhibits, and three pages of oral testimony. Exhibit 1, is the complete record of the Oregon Court, and is found on pages 66-125 of this record. Exhibit 2, (record 125). Exhibit 3, (record 130), and exhibit 4, (record 134), are plaintiff's muniments of title. Exhibit 5 is the check given in consideration for and the testimony of plaintiff relates exclusively to the time, place, and manner of acequiring these lands.

There is no showing nor claim of any mistake, fraud or unavoidable accident preventing the appearance on the part of the plaintiff here or its predecessor in interest in the Oregon Court. We find therefore the substantial scope and purpose of this proceeding, is to correct an error appearing on the face of the record, in a judgment in a State Court.

Mr. Street in his work on Equity Practice, referring to the question here, says:

> 'But as a matter of comity and policy, the Federal Courts will sometimes refuse to give relief in a cause where the plaintiff's rights can be amply protected by the remedy provided in the State Courts. Furthermore, the Federal Court is always careful not to permit its independent equitable jurisdiction to be perverted into an instrument for obtaining relief that ought properly to be obtainable on appeal in the State Court.''

(Street, Federal Equity Practice, Sec. 25).

The attachment of real property and its subsequent sale under a judgment of the State Court will give the State Court jurisdiction which will not be attacked in a collateral proceeding in the Federal Court.

A case which seems to us to be decisive of this matter, is the case of Cooper vs. Reynolds, 10 Wallace 308-321, 19 Law. Ed. 931.

This was a case very similar to the case at bar. Ejectment was brought by the defendant in error on the ground that the title of the defendant Cooper, was void, by reason of the fact that certain judicial proceedings of the State Courts of Tennessee on which it was based, were void for want of jurisdiction. In that case as in this, the record of the proceedings in the State Court was introduced in evidence. The Court instructed the jury that they were null and void for want of jurisdiction. There. as in this case, a writ of attachment was issued; no process was ever served on Reynolds. The objections taken to the proceeding on attachment, were,

First: That by the law of Tennessee, the attachment could not be issued at the beginning of the suit where action was ex delicto, but could only be issued after suit commenced.

Second: That the affidavit was defective.

Third: That there was no publication of notice as required by the statutes.

It was plain in that case, that the State Court of Tennessee had no jurisdiction of the person of the defendant. It was also plain that the writ of attachment was void. The property was, however, seized by the Court and sold under final judgment. The property here was seized by the Court, and sold under final judgment. The Court in each case had jurisdiction of the subject matter and the property. It was there urged, as it is here, that the right to adjudicate was not acquired by reason of the attachment, and such had been the holding of the Tennessee Courts. The Courts of Tennessee had previously held to this effect, but in the Cooper vs. Reynolds case, the Supreme Court of the United States, held that so far as a review by the Federal Courts was concerned, the seizure of the property was the one essential of jurisdiction. The State Court was a Court of general jurisdiction; it had jurisdiction of the subject matter; it had jurisdiction of the property by seizure. In that case, the Supreme Court of the United States said:

> "Now in this class of cases, on what does the jurisdiction of the Court depend? It seems to us that the seizure of the property, or that which in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it, unquestion-

ably, is in proceedings purely in rem. Without this the Court can proceed no further; with it the Court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the Court, issued in proper form under the seal of the Court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into Court, the power of the Court over the res is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied, the affidavit has served its purpose and, though a revisory Court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the Court of the jurisdiction acquired by the writ levied upon defendant's property.

"So, also, of the publication of notice. It is the duty of the Court to order such publication, and to see that it has been properly made and, undoubtedly, if there has been no such publication, a Court of Errors might reverse the judgment. But when the writ has been issued, the property seized, and that property been condemned and sold, we cannot hold that the Court

had no jurisdiction for want of a sufficient publication of notice."

Cooper vs. Reynolds
10 Wall. 308
19 Law. Ed. 931.

Again with reference to defects and irregularities where the property has been seized by attachment, the case of Cooper vs. Reynolds was approved in the case of Mathews vs. Densmore, (109 U. S. 216) in which the Supreme Court said:

"The precise point as to the validity of this writ of attachment was under consideration in this Court in the case of Cooper vs. Reynolds, 10 Wall., 308 (77 U. S. XIX., 931), in which the effect of an insufficient affidavit for a writ of attachment was set up to defeat the title to land acquired by a sale under the attachment. The case has been quoted often since, and is conclusive in the Federal Courts in regard to the validity of their own processes when collaterally assailed as in the present case.

"The Court, after discussing the nature of the jurisdiction in cases of attachment, their relation to suits in rem and in personam, in answer to the questions, on what does the jurisdiction of the court in that class of cases depend? answers it thus, "It seems to us that the seizures of the property, or that which in this case

is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in a proceeding purely in rem. Without this, the Court can proceed no further; with it, the Court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the Court, issued in proper form under the seal of the Court, and if it is by the proper officer levied upon property liable to the attachment, when such writ is returned into the Court the power of the Court over the res is established. The affidavit is preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied, the affidavit has served its purpose, and though a revising Court might see in it some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the Court of the jurisdiction acquired by the writ levied upon the defendant's property."

See Voorhees vs. Bank, 10 Pet., 449; Grignon vs. Astor, 2 How., 319."

(27 Law. Ed. Page 913).

This case is cited with approval in the case of Erstein vs. Rothschild, (22 Fed. Page 63), (By Mr. Justice Mattews) in which the Court said:

"It is, then, the doctrine enforced by the Courts of Michigan that a writ of attachment is void unless supported by an affidavit conforming in all material respects to the strict requirements of the Statute, from which the conclusion is deduced that the affidavit itself, being the foundation of jurisdiction, cannot be the subject of amendment. But this is not the doctrine of the Courts of the United States in the case of Matthews vs. Densomer, 109 U. S. 216, S. C. 3. Sup. Ct. Rep. 126. The Supreme Court of the United States reversed the Supreme Court of Michigan on this very point, and held that the jurisdiction of the Court over the property taken by virtue of the writ of attachment did not at all depend upon the regularity or sufficiency of the affidavit; all questions of that character being questions merely of error in procedure. And the principle was then considered to have been fully established in Cooper vs. Reynolds, 10 Wall. 308; and that such is the general rule, embracing the power of amendment, appears also from Tilton vs. Cofield, 93 U. S. 163."

This case was under consideration in Booth vs. Denike, 65 Fed. Page 46, which quotes the Erstein case with approval and permits the amendment of affidavit of garnishment, though such amendment was not authorized by the laws of Texas, under which the case arose, and where it had been held

that such a garnishment was void under the State laws.

This case is also cited with approval in the case of Biglow vs. Chatterton, Circuit Court of Appeals, Eighth Circuit, 51 Fed. Page 620. This was a case in equity to quiet title, as this one is here. In that case the Circuit Court of Appeals for the Eighth Circuit said:

> "The fact is established by this amended proof of publication that the Court had jurisdiction in the attachment suit. That being so, its judgment is not open to collateral attack, however erroneous it may be. It is unnecessary, therefore, to inquire whether there are any mere irregularities or errors in the proceedings for which a Court exercising appellate jurisdiction would reverse the judgment. It is the settled doctrine of the Supreme Court of the United States that an attachment suit against an absconding or non-resident debtor, who does not appear to the action,—which is the case disclosed is a proceeding in rem, in which the levy of the attachment on the property is the one essential requisite to the exercise of jurisdiction; and that when the writ has been issued, the property seized, condemned, and sold, the jurisdiction of the Court over the property is not affected by the fact that there was an insufficient or no publication of notice to the defendant. (Cooper vs.

Reynolds, 10 Wall. 308). In that case, Mr. Justice Miller, who delivered the opinion of the Court, says to hold any other doctrine would be "to overturn the uniform course of decision in this Court, to unsettle titles to vast amounts of property long held in reliance on these decisions, and in our judgment would be to sacrifice sound principle to barren technicalities. *****" It is believed the doctrine of the Supreme Court of the United States on this question is generally approved by the State Courts. In Freeman vs. Thompson, 53 Mo. 183, 198, Judge Sherwood, after discussing the question and citing authorities to support the view maintained in Cooper vs. Reynolds, supra, says: "And I very much doubt whether a single well-considered case can be found in opposition thereto." (Kane vs. McCown, 55 Mo. 181; Johnson vs. Gage, 57 Mo. 160; Paine vs. Moorland, 15 Ohio, 435). It is not necessary to the decision of this case to determine what the doctrine of the Supreme Court of Minnesota is on this subject. In the case of Kenney vs. Goergen, 36 Minn. 190, 31 N. W. Rep. 210, Judge Mitchell, who delivered the opinion of the Court, said,

"The proceedings (by attachment against a non-resident debtor,) although in form in personam are in effect in rem, and it is only by attaching the property that the court acquires jurisdiction, and then only to the extent of the property attached."

In support of this proposition, the learned Judge cites among other authorities, with apparent approval, Cooper vs. Reynolds, supra; but it is not clear that the Court meant to adopt the doctrine of that case in all its breadth. In the attachment suit we are considering, the property was seized on the writ of attachment, and there was due publication of the summons to the defendant also, so that the Court had jurisdiction over the attached property under either rule.

In the case of the Southern Bank & Trust Company vs. Folsom, 75 Federal, Page 931, the Circuit Court of Appeals for the Sixth Circuit, Judge Lurton said:

> The effect of the levy of the attachment issuing from the State Chancery Court, and the return of the writ into Court, under the Tennessee Statutes and decisions, was to place the attached land within the control and possession of the State Court. It was an actual seizure of the res, and thereby passed into the exclusive possession of the Court, as fully as if a receiver had been appointed.
>
> (Cooper vs. Reynolds, 10 Wall. 308, 317).
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> However, defective the proceeding under which the attachment issued, it would not follow that the State Court was without jurisdiction.

> The object of the bill was to subject the land attached as the property of the Magnatite Iron Company to the satisfaction of its debts. For This purpose the land itself was seized, and thus drawn within the jurisdiction of the Court by this assertion of control and power over it. The validity of that act of power and authority could not be questioned by another Court so long as the State Court retained the possession thus acquired.

This same proposition has been before this Court and decided adversely to the position taken by the trial Court in the case of Heid vs. Ebner. That was a suit to quiet title as this one is. It seems therefore, to dispose of the trial Court's contention that a suit to quiet title was not within the rule, that the Federal Courts would not examine into defects and informalities. It will be recalled that the trial Court says in his decision, that this general rule may be conceded, but that a suit to quiet title is an exception. In the Reed case, this Court speaking by Judge Morrow, said:

> "It is the general rule in the United States that the confirmation of a judicial sale by a Court of competent jurisdiction cures all irregularities in the proceedings leading up to or in the conduct of the sale, and that while such a sale will be set aside where fraud, mistake or surprise is shown, mere irregularities in the prelim-

inary proceedings do not render the sale invalid, and will not suffice to set aside after confirmation. Wills vs. Chandler (C. C.) 2 Fed. 273; Cooper vs. Reynolds, 10 Wall. 308.19 L. Ed. 931; Ludlow vs. Ramsey, 11 Wall. 581, 20 L. Ed., 216; Stockmeyer vs. Tobin, 139 U. S. 176, 11 Sup. Ct. 504, 35 L. Ed. 123.

(133 Federal, Page 158).

In the case of Thompson vs. Tolmie, 2 Peters Page 157, 7th Law Ed. Page 381, lays down the law to be, that when the jurisdiction of the Court (under whose authority the order of sale was made) appears on the face of the proceedings, its errors and mistakes, if any were committed, cannot be corrected or examined when brought up collaterally. This case has never been overruled or modified.

In Holmes vs. Oregon & California Ry. Co., 9th Federal, Page 245, Judge Sawyer said:

"The seizure within the County was the jurisdictional fact, and this was an act to be performed by the Court, or, on its behalf, through the agencies appointed by law. The jurisdictional fact was an act to be performed to get jurisdiction of the thing, in all respects analogous to the service of summons within the State in order to acquire jurisdiction of the person, or levy of an attachment upon the property in an attachment suit in order to get jurisdiction of the property."

In the National Nickel Co., vs. Nevada Nickel Syndicate, 112 Federal, Page 44, in the Circuit Court for the Ninth Circuit, sustaining a judgment upon insufficient publication said:

> "The general and well-settled rule of law in such case is that when the proceedings are collaterally drawn in question, and it appears upon the face of them that the subject matter was within the jurisdiction of the court, they are voidable only.
>
> The errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court to set aside such faulty proceedings, or in an appellate court. Thompson vs. Tolmie, 2 Pet. 157, 163, 7 L. Ed. 381; Voorhees vs. Bank, 10 Pet. 469, 9 L. Ed. 490; Cooper vs. Reynolds, 10 Wall. 308, 319, 19 L. Ed., 931, Burley vs. Flint, 105 U. S., 247, 26 L. Ed. 986.

It will be recalled that there was other evidence to support the findings of the Court, than the affidavit which was called in question. The Supreme Court of Oregon had theretofore held that where an affidavit was presented that contained some proof of non-residence, that was sufficient to give the judge jurisdiction. Speaking through Mr. Justice Bean then on the Supreme bench of Oregon, in the case of George vs. Nowlan 38th Oregon, 537, 64 Pac. 1, it says:

"The statute requires that certain facts shall be made to appear by affidavit, to the satisfaction of the Court or judge thereof (Hill's Ann. Laws Or. 56), before an order of publication is made; and where the affidavit tends to prove such facts, and the Court or judge adjudges it sufficient, such adjudication is conclusive in a collateral proceeding. 17 Enc. Pl. & Prac. 78; Pennoyer vs. Neff, 95 U. S. 714, 24 L. Ed. 565. The defects in the affidavit referred to could have been taken advantage of by an appeal or some other direct proceeding, but do not furnish ground for an injunction restraining the enforcement of the decree.

The case of Graff vs. Lewis, 71 Federal, 591 is a case very much like the case at the bar. The decision is by Judge Shiras.

In this case, "H and others brought an action in a Nebraska court of competent jurisdiction against G and others, non-residents of that state, and filed in the clerk's office an affidavit for the purpose of securing an attachment against the defendant's property in accordance with the procedure in that state. The clerk accordingly issued the attachment which was levied upon the land, the record title to which stood in G's name. Afterwards, by due proceedings, judgment was entered in the action, the defendants being served by publication, and

not answering and the attached property was sold under the order of the Court, and bought by one L. Subsequently one E. to whom G had conveyed the land before the commencement of the attachment suit, but whose deed was not recorded till after the sale to L., brought suit against L to assert his title to the land, alleging that the affidavit upon which the attachment against G. & Co., was granted did not comply with the requirements of the Nebraska statutes. **Held,** that the validity of the judgment of the Nebraska Court could not be collaterally attached on such grounds."

This doctrine is approved in the late case of the Union Pacific Ry. Co., vs. Flynn, 180 Federal, 565, in which the Court says:

> "It appearing then that it is sought by this action in effect, to review proceedings in a state court of competent jurisdiction for the revision of alleged errors and irregularities therein, apparent upon the face of the record, and that complainant is not without an adequate remedy in the jurisdiction in which such irregularities arose, and are properly reviewable, it follows that this Court cannot take jurisdiction of the matter."

This case is complete, throughout, well considered and decided July 16, 1910.

The Honorable Trial Court sought to distinguish

the case at bar from the case of Cooper vs. Reynolds. He says, at page 50 of the Record:

> "An action against a non-resident is ineffectual unless some property of the defendant is brought within the control of the Court and subject to its disposition by writ of attachment, but the right in Oregon to adjudicate thereon is acquired not by the attachment and publication thereof, as was the case of Cooper vs. Reynolds (10 Wall. 308) but by the service of summons upon the defendant either in person or by publication."

We submit that the Honorable Trial Court is in error in respect to this matter, for, as we have before stated, the rule was in Tennessee that an invalid attachment would not give jurisdiction, and the courts of Tennessee had held that upon direct attack, such want of jurisdiction would be found. This matter was carefully presented to the Supreme Court of the United States, in the case of Cooper vs. Reynolds and was carefully considered by the Supreme Court of the United States, and was there held adversely to the statement of the Trial Court.

The Honorable Trial Court was also in error, we submit, in his statement with reference to the law of Oregon. The Supreme Court of that State has said, in the case of Bank of Colfax vs. Richardson,

34 Ore. 518, 75 Am. State Reports 664, 54 Pac. 359, speaking by Judge Bean:

> "When, therefore, the Court has the de facto custody of the property by virtue of a de facto writ of attachment, and a right to determine whether such property shall be subject to the payment of plaintiff's demand by virtue of constructive service of process, it has full and complete jurisdiction in the premises, and subsequent errors or irregularities in the proceedings will not be available on collateral attack."

In which the case of Cooper vs. Reynolds is discussed at length. Judge Bean says, after having quoted at length from that case,:

> "This case has been often quoted and approved by the Supreme Court, and is said in Mathews vs. Densmore, 109 U. S. 216, 219, to be conclusive in regard to the validity of such proceedings when collaterally assailed."

The Bank of Colfax case was a collateral attack in the Courts of Oregon upon a judgment entered by the Court of Oregon, and therefore stands in a different relation from a collateral attack upon the State Court in the Courts of the United States, as we have tried to point out. In that case, there was no proof of service of summons. The original summons did not appear in the judgment roll, and other defects are noted. Yet, the judgment entered in this regard was held to be proof against collateral attack.

It seems to us, therefore, that the Honorable Trial Court failed to make the distinction which the Supreme Court of the United States had made in these cases, and this seems to us to be the gist of this appeal. The Supreme Court of the United States says that the fact of attachment gives the Court such jurisdiction in the case that it will not be attacked in the Federal Courts in a collateral proceeding. In other words, it is the fact of attachment that gives the Court such jurisdiction as will protect it from collateral attack. It may be true that this fact of attachment would not protect from collateral attack in the Courts of Oregon but it seems plain that the Federal Courts have held that it would protect from collateral attack by the Federal Courts. The Supreme Court in the case of Cooper vs. Reynolds says so in so many words. This case has never been reversed or modified, but has been approved in many cases in the Federal Courts.

Cole vs. Cunningham, 133 U. S.
116, 33 L. Ed. 543.

It cannot be questioned that by the levy of the writ of attachment, and the institution of the proceedings in equity to settle the title to the attached property, the jurisdiction of the State Court over the realty became of the nature of jurisdiction in rem.

Gates vs. Bucki, 53 Fed. 967.
Pennoyer vs. Neff, 95 U. S. 714.

The question of the jurisdiction of the Oregon Court is not to be determined by the laws of Oregon and the decision of its Courts, but is a question to be determined by the United States Courts and tested by the law as administered by them.

Rogers vs. Alabama, 192 U. S. 226, 231, 48 L. ed. 417, 419, 24 Sup. Ct. Rep. 257;

German Sav. & L. Soc. vs. Dormitzer, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221.

Huntington vs. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep.

Pennoyer vs. Neff. 95 U. S. 714, 24 L. Ed. 565.

Any other rule would preclude the United States Court from exercising jurisdiction where it was denied by the State Court or refusing jurisdiction where it was granted by the State Court.

Where the Court makes a solemn finding, that it appears to its satisfaction that the defendant cannot be found within the State, and makes an order of publication of summons, such finding is proof against collateral attack.

There is another and sufficient reason why the Trial Court should not have taken jurisdiction in this proceeding, as has been pointed out. The defect relied upon was the insufficiency of an affidavit for publication. It will be recalled that Judge Hamilton of the Circuit Court of Oregon made an order directing the publication of this summons, in which he recited:

"It appearing TO THE SATISFACTION OF THE COURT that neither of the defendants above named can be found within the State of Oregon".

It will be also observed that publication of notice was actually given as fully as it would have given, had the affidavit referred to been sworn to before an Oregon notary public. This identical question was before the Supreme Court of the United States on this identical statute under identically the same circumstances in the case of Pennoyer vs. Neff, 5 Otto, 714-748, 24 Law Ed. 565. This was an action to recover the possession of a tract of land situated in Oregon. The plaintiff claimed under a patent, the defendant claimed under a judicial sale. It was contended that the judgment was invalid from defects in the affidavit upon which the order of publication was obtained and in the affidavit by which the publication was proved. The Court, in that case, speaking by Mr. Justice Field, said:

"The Court below did not consider that an attachment of the property was essential to its jurisdiction or to the validity of the sale, but held that the judgment was invalid from defects in the affidavit upon which the order of publication was obtained, and in the affidavit by which the publication was proved.

"There is some difference of opinion among the members of this Court as to the rulings upon

these alleged defects. The majority are of opinion that, inasmuch as the statute requires, for an order of publication, that certain facts shall appear by affidavit to the satisfaction of the Court or judge, defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally."

It will be observed that this opinion was written some years after that of Galpin vs. Page, Supra, relied upon by the Trial Court. It will be also observed that the case of Galpin vs. Page was cited by counsel and cited by Court in this case. It may be claimed that the expressions used here are obiter, but it cannot be successfully so claimed. The rule which the Supreme Court made was necessary to the decision of the case.

We cannot understand how the Honorable Trial Court can distinguish that case from the one at bar. The facts with reference to the affidavit are identical, and the words in the order made by Judge Hamilton are the exact words used by and referred to by the Supreme Court of the United States. It seems to us that there is no escape from this ruling. It may be claimed that that was an action for the possession of land, while the case at bar is a suit to quiet title, but we submit that there is no distinction. Under the Oregon law, title may be tried either in an action to recover possession or in a suit to quiet title.

Since the decisions in the cases of Pennoyer vs. Neff and Galpin vs. Page, both of these cases were considered in the case of Applegate vs. Lexington & Carter County Mining Co., 117 U. S. 255, 29 Law Ed. 892. This was a suit in the nature of an action of ejectment to recover possession of land in Kentucky. In that case, the plaintiffs presented a certified copy from the Mason County Circuit Court of a case formerly pending therein, as one of their muniments of title. This was rejected for sundry defects in the publication of notices. In that case the Court said:

> "The result of the authorities and what we decide is, that where a Court of general jurisdiction is authorized in a proceeding, either statutory or at law or in equity, to bring in, by publication or other substituted service, non-resident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and THE COURT
>
> ORDERS SUCH SUBSTITUTED SERVICE,
>
> it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid. The case of Galpin vs. Page, 18 Wall. 350 (85 U. S. bk. 21, L. ed. 959), cited by counsel for defendant, is not in conflict with this proposition. The judgment set up

on one side and attacked on the other in that case was rendered on service by publication. The law permitted service to be made by publication only where certain facts were made to appear to the satisfaction of the Court, and the Court by a precedent order, which must necessarily appear of record, authorized service to be made by publication. But the record showed no such order, and the publication, therefore, was the unauthorized act of the party, and appeared affirmatively to be invalid and ineffectual. See also Pennoyer vs. Neff, 95 U. S. 727, 734 (Bk. 24, L. ed. 570, 572)".

There was sufficient showing in this case to justify the Oregon Court in its finding, that it appeared to the satisfaction of the Court that the defendant could not be found within the State of Oregon.

The doctrine that defects in an affidavit for an order for service of summons by publication cannot be urged to impeach the judgment collaterally, has been reaffirmed in the following cases in the United States Court:

Holmes vs. Ore. & Cal. Ry. Co.
9 Fed. 245.
Beattie vs. Wilkinson
36 Fed. 650.

and many other cases, and in the Courts of Oregon, in the cases of

George vs. Nowlan, 34 Ore. 543, 64 Pac. 1.

McFarlane vs. Cornelius, 43 Ore. 519, 73 Pac. 325.

The Oregon provision with relation to affidavits for publication of summons came under the attention of the Supreme Court of the United States in the recent case of Marx vs. Ebner, (1901,) 180 U. S. 314-320, 45 Law Ed. 547, from the District Court of Alaska. This identical Oregon statute was then under consideration. In that case the Supreme Court said:

"We think where the affidavit shows that the defendant is a non-resident of the district and that personal service cannot be made upon him, and the marshal, or other public officer to whom the summons was delivered, returns it with his indorsement that after due and diligent search he cannot find the defendant, such proof is sufficient to **give jurisdiction to the Court or judge to decide the question.** It is not to be expected that positive proof that the defendant cannot be found within the state or district will always be attainable. Facts must appear from which it will be a just and reasonable inference that the defendant could not after due diligence be found, and that due diligence has been exercised, and we think such an inference is reasonable when proof is made that the defendant is a non-resident of the state, and there is an affidavit that

personal service cannot be made upon him within its borders and there is a certificate of the marshal such as appears in this case. There is, too, some presumption that the public officer who has received the process for service has done his duty and has made the reasonable and diligent search for the defendant that is required. Such presumption is not alone sufficient in the absence of all proof of other facts, but when such other facts as appear in this case are sworn to, it may add some weight to them as a presumption in favor of the performance of official duty.

"Within this rule the proof in this case was enough to give jurisdiction to the judge who granted the order to decide the question."

In this case there is a return of the sheriff "not found". There is the affidavit of O. P. Coshow that the last known post office address of the defendants was at Hoquiam, Washington, and Seattle, Washington, respectively. This affidavit was not questioned. There was the defective affidavit. There was the affidavit (Record page 92) of Coshow that the address of the defendants is unknown, and upon this evidence, and we know not what other evidence, Judge Hamilton of the Oregon Court made his finding that the defendants could not be found within the State of Oregon. Such finding, it seems to us, is conclusive. This whole question has been discuss-

ed at length in the case of Cohen vs. Portland Lodge No. 142, B. P. O. E., 144 Fed. 274. In this case, however, the point does not seem to have been raised that the Court would not search the Oregon record. It is nowhere referred to in the opinion. In that case the affidavit for publication was found to be sufficient. This case was appealed to this Court and it is found, in 152 Federal 357, where the whole question of the insufficiency of an affidavit for publication was discussed. The point does not seem to have been raised in this Court in this case that the Federal Courts would not set aside a judgment of a State Court for defects appearing solely on the face of the record. It is not discussed in the later case of Ranch vs. Werley, 152 Fed. 509. This Court, speaking by Judge Wolverton, discussed the subject of the sufficiency of affidavits of publication. In that case this Court said:

> "It is deemed sufficient, under the authorities, that facts be stated from which it shall appear, to the satisfaction of the Court or judge making the order, that personal service cannot be had upon the defendant within the State."

So far as we are able to ascertain, the question was not raised in that case as to whether or not this Court would overturn the record of the Oregon Court for defects based upon the insufficiency of the record, and judged solely by an examination of the record. In the Worley case, one of the elements charged was

that there had been fraud in obtaining the judgment. This was not sustained. It will be observed that in each of the cases, the affidavit for publication was found to be sufficient. The later case of Bower vs. Stein, 165 Fed. 232, 177 Fed. 673, also discussed the sufficiency of affidavits for publication, and the publication in each instance sustained. In these cases the point that the Court would not search the Oregon record does not seem to have been raised.

Our view of this matter is this; that in an attachment case, the Court gets jurisdiction of the res ~~on~~ and subject matter.

That upon an application for an order for publication, it becomes the duty of the Court to examine the record and make an order for publication. That this is a judicial function. That if the Court has any evidence before it, an erroneous finding on such evidence constitutes error of law, and not total want of jurisdiction. That the finding of the Oregon Court that it appears to the satisfaction of the Court that the defendant could not be found within the State of Oregon, at most constituted error.

That even if this were based solely upon an affidavit made by a Washington Notary Public, it would constitute error, and not lack of jurisdiction. That the United States Court will not set aside this judgment for error in the exercise of a judicial function. That therefore, the Honorable Trial Court erred in finding the Oregon judgment a mere nullity, and

that in fact, such Oregon judgment is proof against collateral attack.

As we have heretofore said, we understand that it is conceded, if the affidavit which was attacked is sufficient, then the title to this property is in appellant. But lest there be some misunderstanding in that regard, we will briefly state the facts which show appellant's title.

The property in question was attached under the writ from the Oregon Court on the 1st day of April, 1907. The property had been acquired by Aaron Johnson under the timber act previously thereto for such purpose. It had been deeded from Aaron Johnson to Andrew Johnson, his brother, on May 24, 1904, under a consideration expressed as One Dollar ($1). On February 27, 1907, Aaron Johnson made a deed to the North Star Lumber Co. On April 8, 1907, Andrew Johnson deeded back to his brother Aaron. Both deeds were delivered to the North Star Lumber Co. on April 12, 1907, twelve days after the attachment; and both deeds were recorded on April 24th, 1907, twenty-four days after the attachment. Our position is,

First: That as shown by the record, the property was, at the time of the attachment, the property of Aaron Johnson, the defendant in the Oregon Court, or

Second: If this is not the case, the attachment

seized upon the afterward acquired title, acquired by the deed of April 8, 1907, and took precedence over any subsequent transfers and subsequently recorded deeds, inasmuch as the law of Oregon provides that an attaching creditor is a bona fide purchaser and would take the afterward acquired title.

Discussing the proposition which comes up in this cause on account of the attachment of the real property in controversy, it is safe to say that if Aaron Johnson was the owner of the land in controversy on April 1, 1907, at the time the action was brought by John W. Johnson vs. Aaron Johnson et al, in the Circuit Court of the State of Oregon for Douglas County, that the attachment of said property was regular. The plaintiff will not deny this.

That Aaron Johnson was the owner of the property attached appears from plaintiff's Exhibit 4, which is the deed from Aaron Johnson to the North Star Lumber Company. Aaron Johnson, as grantor, says in that deed that he is the owner and has a right to sell the property, and he agrees to warrant and defend the title thereto. According to said exhibit, the consideration received for that deed was $2,000.00. It is not strange that the only evidence of consideration (other than a nominal) in any of the deeds conveying this property is in the one from Aaron Johnson to plaintiff. The deed from Aaron Johnson to Andrew Johnson, dated May 21, 1904, expresses a consideration of $1.00. (Plaintiff's Exhibit No. 2.) The deed from Andrew Johnson to

Aaron Johnson, dated April 8, 1907, expresses a consideration of $1.00. (Plaintiff's Exhibit No. 3.) But the deed from Aaron Johnson to plaintiff expresses a consideration of $2,000.00. This deed was delivered about April 12, 1907. According to the testimony of Mr. Williams, Aaron Johnson evidently had an interest in the property in controversy, which plaintiff estimated to be worth at least $2,000.00, on April 12, 1907.

If Aaron Johnson owned the property in dispute on February 21st, at the time the deed to plaintiff was signed, or on March 8, 1907, at the time this deed was acknowledged, he also was the owner on April 1, 1907, at the time this property was attached. Evidently the deed from Andrew Johnson to Aaron Johnson, dated March 8, 1907, (Plaintiff's Exhibit No. 3,) was for no other purpose than to complete the chain of title.

An attaching creditor "is deemed a purchaser in good faith for a valuable consideration of the property *** attached ***" Sec. 301 L. O. L.

When the sheriff's certificate is filed for record "the lien in favor of plaintiff shall immediately attach to the property described in the certificate." Sec. 303 L. O. L.

An attachment lien perfected in compliance with the foregoing sections gives to an attaching creditor from the time of attachment a valid, subsisting

lien which continues during a period an execution could issue.

Riddell vs. Miller, 19 Or. 368; 23 Pac. 807.

Katz vs. Obenchain, 48 Or. 352-**356**; 85 Pac. 617.

Jennings vs. Lents, 50 Or. 483-**487**; 93 Pac. 327.

In discussing attachment liens, the Supreme Court of Oregon has used the following language:

> "The intention of the legislature in adopting these several provisions of the statute was to give the lien creditor under an attachment, judgment or execution, the same standing in regard to his right in or to the property affected thereby which he would gain by a purchase of the property from the debtor, so that in case the debtor had, prior to the levy or of the attachment or execution or the docket of the judgment, executed a deed of conveyance of it, if real property, and the deed were not recorded *** within five days, it would be void as provided in Section 3027 Ann. Code." (Sec. 7129 L. O. L.) Riddell vs. Miller, 19 Or. 368.

And such has been the holding of that Court through a long line of decisions cited in Jennings vs. Lents, 50 Or. 483-487 (93 Pac. 327), and in that case the question of right of an attaching creditor in

good faith and bona fide purchaser is discussed, and the following language is used:

"In order, therefore, to determine whether defendant's title is superior to that of plaintiffs, it is necessary to ascertain only whether, in lieu of the course pursued, he would have been a purchaser in good faith, if with the limited knowldge of the status of Duvall's title at the time of the levy, defendant had purchased the property from him and paid a valuable consideration therefor. If answered in the affirmative, he has the better title, and must prevail; otherwise plaintiffs have the superior title, and are entitled to the relief demanded. Under the law as it existed prior to the adoption of the statute mentioned, to the effect that after the filing of the attachment proceedings the creditor shall be deemed a purchaser in good faith, the creditor, by virtue of his attachment, acquired a lien only on the actual interest which the debtor had in the property: Riddle vs. Miller, 19 Or. 468 (23 Pac. 807). It is obvious that the statute on this point was intended to modify this rule, and to give the attaching creditor, regardless of the actual condition of the debtor's title, additional protection by placing him in the same position as a bona fide purchaser for value, in case of failure on the part of the real owner to observe the requirements of the recording acts. But, in construing these acts, it

has been repeatedly held, and has become a settled rule in this State, that an attaching creditor, although placed in an equality with a purchaser by this statute, cannot insist on any greater protection than would be granted to such purchaser; and in suits in equity, the claim of a bona fide purchaser for value is an affirmative defense, which must be pleaded, thereby placing the burden of proof in such cases upon the party relying thereon:" Citing cases.

So according to the Oregon decisions an attaching creditor is placed on an equality with a bona fide purchaser for value. If an attaching creditor is placed on an equality with a bona fide purchaser, and gives him such rights as he would acquire under voluntary sale of the property by the debtor for a valuable consideration, then it will cut off equities of third persons in the property where the proceeding is taken and perfected without knowledge of such equities. Jennings vs. Lents, Supra.

Now, then, if under our law the rights and responsibilities betwen attaching creditor of real property and debtor are identical, and of the same quality as the rights and responsibilities in a transaction, between vendor and purchaser of the real property for a valuable consideration, then and in that event between such parties and their privies an attachment creditor's lien would fasten

to and after acquired title; that is, the attachment lien of the defendant John W. Johnson would fasten onto any after acquired title Aaron Johnson might have received by the deed from Andrew Johnson to Aaron Johnson, dated April 8, 1907. (Plaintiff's Exhibit No. 3.)

None of those deeds executed in 1907 were valid as against the attachment lien obtained by defendant John W. Johnson in the proceeding in the State Circuit Court for Douglas County, if for no other reason than that none of the deeds were recorded within five days from the date of execution. Sec. 7129 L. O. L.

In operation a bargain and sale deed (and an attaching creditor certainly occupies a position as favorable as a grantee in a bargin and sale deed) conveys an after acquired title.

Taggart vs. Risley, 4 Or. 239.
Langley vs. Kessler, 57 Or. 281-**291**.
U. S. vs. Cal. Land Co. 148 U. S. 31-**47**.

So, whatever title Andrew Johnson transferred by his deed to Aaron Johnson, dated April 8, 1907, was subjected to the attachment lien of defendant John W. Johnson in the State Court proceeding. By the supplemental stipulation it is admitted that the order dated October 11, 1907, authorizing the publication of summons was signed in the proper journal, and in that event plaintiff's objection to the publication of summons is not well taken, as there were

three affidavits in the State Court proceeding in Douglas County tending to show the non-residence of Aaron W. Johnson, besides the "not found" return of the sheriff of that county. If the affidavits were not as full and complete as they should have been, those matters were irregularities and should have been corrected in the State Court, and cannot be investigated in this proceeding, as brought up by plaintiff.

Therefore, whether we say Aaron Johnson was the real owner of the property in controversy on April 1, 1907, or whether he again acquired title to said property on April 8, 1907, from Andrew Johnson, the lien of the attaching creditor in the proceeding in the State Court was a valid lien on said property, and as to said lien plaintiff's unrecorded deed is void.

In conclusion, we do not want to be understood as asking affirmative relief. We urge that the Court erred in entertaining jurisdiction in this proceeding, and proceeding of the trial thereof, and erred in not dismissing the action.

We therefore, ask this court to remand the cause with instructions to dismiss the suit, or for such other relief as to the Court may seem equitable.

Respectfully submitted,

MORGAN & BREWER,
JOHN VAN ZANTE,
Solicitors for Appellant.

IN THE

United States Circuit Court of Appeals,

NINTH CIRCUIT.

JOHN W. JOHNSON, *et al.*,
Appellants,
vs.
NORTH STAR LUMBER COMPANY,
a Corporation,
Respondent.

BRIEF.

Respondent's Statement of the Case.

While we adopt in the main the statement of the case contained in Appellant's brief, we wish to note some exceptions and corrections thereto, and to make a few additions.

This is a suit brought by the North Star Lumber Company against appellant, John W. Johnson, and two others, to quiet title to certain land in Douglas County, Oregon. Appellant alone made defense, the other two defaulting.

The tract in question was patented by the Government to one Aaron Johnson, who, by a deed dated May 21, 1904, recorded June 7, 1904, transferred the land to one Andrew Johnson, in whom the title remained vested until, by a deed dated April 8, 1907, delivered April 12, 1907, and recorded on the 24th day of the same month, he conveyed same to said Aaron Johnson.

The latter then, by a deed dated February 21, 1907, acknowledged March 25, 1907, and delivered April 12, 1907, conveyed the tract to the plaintiff, the Respondent herein.

Meantime, while plaintiff had its negotiations for the purchase under way and on April 1, 1907, and while the title still stood in Andrew Johnson, the Appellant commenced an attachment suit, in the Circuit Court of the State of Oregon for Douglas County, against said Aaron Johnson and another, and caused the property to be attached in said action on that day as the property of the two defendants therein named. It is not claimed that the second of said defendants ever had any interest in the land. The Respondent earnestly contends, and has brought its suit upon the theory, that, as shown by the admissions of the pleadings and the proofs at the trial, the defendant Aaron Johnson had no title to the property at the date of the attachment; that there never was any valid attachment for this reason; and that, therefore, the whole proceeding was void on this ground, as well as others.

After thus issuing a writ of attachment and causing the same to be levied against the property on the first day of April, 1907, the Appellant, as plaintiff in said action pending in Douglas County, made a pretended affidavit for publication of summons therein. This so-called affidavit appears at pages 84 and 85 of the printed transcript and purports to have been sworn to before a Notary Public for the State of Washington, residing at Hoquiam, on the 7th day of September, 1907. The Respondent contends, as one of the grounds for over-

throwing the judgment upon which Appellant rests his title, that this pretended affidavit is void and is no affidavit at all.

The statute of Oregon then in force respecting affidavits, being Section 819 of Bellinger & Cotton's Annotated Codes and Statutes of Oregon, was as follows:

> An affidavit or deposition taken in another state of the United States or a territory thereof, the District of Columbia, or in a foreign country otherwise than upon commission, must be authenticated as follows, before it can be used in this state:
>
> 1. It must be certified by a commissioner appointed by the governor of this state to take affidavits and depositions in such other state, territory or district, or country; or,
>
> 2. It must be certified by a judge of a court having a clerk and a seal, to have been taken and subscribed before him, at a time and place therein specified, and the existence of the court, the fact that such judge is a member thereof, and the genuineness of his signature shall be certified by the clerk of the court, under the seal thereof.

Inasmuch as the Appellant has the temerity to contend that certain other affidavits which were filed in the cause, made in Oregon by O. P. Coshow and Evelyn Johnson, were sufficient, independently of the void affidavit above mentioned, to sustain the order for publication of summons, we will set up the particulars respecting them, after noting some of the requirements of the Oregon law as to what must be shown by affidavit for

publication of summons, as found in Section 56 of Lord's Oregon Laws:

> When service of summons cannot be made as prescribed in the last preceding section, and the defendant after due diligence cannot be found within the state, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, or the judge authorized to grant the order herein provided * * * the court or judge * * * shall grant an order that the service be made by publication of a summons in either of the following cases* * * :
>
> 3. When the defendant is not a resident of the state but has property therein.

The Court will note that the showing "that the defendant after due diligence cannot be found within the state" must be by *affidavit,* no other method of proving that fact being admissible under the statute; and also that it is absolutely essential that the defendant shall have property in the state.

Now the affidavits which the Appellant contends are sufficient, disregarding the void so-called affidavit made outside the state of Oregon, are the ones sworn to by O. P. Coshow and Evelyn Johnson. These affidavits appear at pages 83, 92 and 93 and are as follows:

> I, O. P. Coshow, being first duly sworn, say that I am one of the plaintiff's attorneys in the above entitled action. That the postoffice address of neither of the defendants could be ascertained at the present time. That I prepared the affidavit to John W. Johnson filed herewith and mailed it to his at-

torney at Hoquiam, for his examination. That I requested information regarding the present postoffice address of both said defendants and was informed by plaintiff through his attorney that the same is unknown to him, and could not be ascertained by him through inquiry among the former associates and friends of said defendants at Hoquiam, or by other means.

That the last known postoffice address of defendants is as follows: Aaron Johnson at Hoquiam, Washington; Eline Engebritson, at Seattle, Washington, but the local address is not known.

O. P. COSHOW.

Subscribed and sworn to before me this 9th day of September, 1907.

DEXTER RICE,

(Seal.) Notary Public for Oregon.

I, O. P. Coshow, being first duly sworn say: That heretofore, on the 9th day of September, 1907, Hon. G. W. Wonacott, County Judge, duly made an order for publication of summons in the above entitled action, and directed that copies of said summons be forthwith mailed to the defendants, and each of them, at Hoquiam, Washington; that on the 10th day of September, 1907, I caused copies of said summons and copies of the complaint, duly certified, to be mailed to said defendants, separately, as shown by the affidavit to Evelyn Johnson hereto attached, marked Exhibit A, and made a part of this affidavit; by inadvertance I neglected and omitted to have said

summons published and summons has not been published in this action; that both of said letters addressed to the defendants as aforesaid, at Hoquiam, Washington, have been returned unopened and uncalled for; that the address of either of the defendants is unknown to the plaintiff and cannot be ascertained with reasonable diligence; that due and strict enquiry has been made to ascertain said addresses from the former friends of the said defendants living at Hoquiam, Washington, by the plaintiff and his attorneys at Hoquiam, C. W. Hodgdon, and no one can be found who knows their addresses.

O. P. COSHOW.

Subscribed and sworn to before me this 11th day of October, 1907.

DEXTER RICE,

(Seal.) Notary Public for Oregon.

I, Evelyn Johnson, being first duly sworn, say that I am a citizen of the United States, over the age of twenty-one years. That on the 10th day of September, 1907, at Roseburg, Oregon, I deposited in the United States Postoffice, enclosed in an envelope securely sealed, and with postage fully prepaid, a copy of the complaint and summons, directed to be published, in the above entitled action, duly certified to be such copies by O. P. Coshow, an attorney for the plaintiff, plainly addressed to the above named defendant, Aaron Johnson, Hoquiam, Washington; and also a like copy of said summons and complaint, enclosed in an envelope, with postage fully prepaid,

as aforesaid, and plainly addressed to the above named defendant Eline Engebritson, Seattle, Washington.

That I am not related to either the plaintiff nor defendant named above, nor am I a party to said action.

EVELYN JOHNSON.

Subscribed and sworn to before me this 10th day of September, 1907.

DEXTER RICE,
(Seal.) Notary Public for Oregon.

The Court will note that there is not a word in these affidavits touching the point of whether or not the defendants after due diligence could be found within the State of Oregon, which is the absolutely essential point required by law to be shown by affidavit; and which cannot be shown in any other way. Neither does the court in the order for publication find that such fact has been shown by affidavit; merely reciting that "it appearing to the satisfaction of the court that neither of the defendants above named can be found within the State of Oregon"; the recitations containing no reference to a showing by affidavit and omitting any finding as to diligence.

We have gone into detail respecting the affidavits, because the contention that these different sworn declarations of Mr. Coshow and Evelyn Johnson would suffice to sustain the order of publication seems to us to be disposed of beyond the point of argument, by merely setting forth what the affidavits in fact contained.

The respondent has a complete title by chain of *mesne* conveyances from the Government to itself; and for the appellant to have a decree in his favor, it is necessary for him to establish the validity of the sheriff's deed which he has put in evidence, based on the court proceedings in Douglas County.

The appellant is in Court, not only as defendant to deny and overcome the title of the plaintiff as made out by said chain of deeds, but as a cross-complainant, setting up his title by virtue of the execution sale, and seeking to have the same quieted against the plaintiff (see page 23 of the printed abstract). Plaintiff, the respondent here, has answered the cross-bill, setting forth the facts on which it relies to overthrow said judgment and execution sale; to which answer no replication was made.

Appellant seeks throughout his statement of the case and the argument to make it appear to the Court that the respondent's contest against the validity of the execution sale is founded solely upon matter apparent on the face of the judicial record in Douglas County; which is not true. It has been urged in the pleadings and at every stage of the case and is here earnestly maintained by Respondent that the judgment and execution sale were totally void for want of property in the custody of the court to give jurisdiction for proceedings by constructive service of summons. This is matter extrinsic to the record of the action in the Douglas County court.

The plaintiff's contention is that the Court never acquired jurisdiction of either the person of the defendant,

Aaron Johnson, or the property involved, to render any judgment, and that the proceedings on execution, whereby the defendant Johnson deraigns his title, are therefore void. This contention is based on the following points:

1. No affidavit showing the facts required by the statute to be shown as the basis for a service of summons by publication was ever filed in the case;

2. No property of the defendant Aaron Johnson, against whom judgment was given and execution was issued was attached therein.

We claim that each of these defects is jurisdictional. We understand the position of the defendant to be that the proceeding was strictly *in rem,* and that the failure to observe the statutory provisions for notice to the defendant before the rendition of judgment was not fatal, so far as a judgment against the property seized under attachment was concerned; in other words, that the only essential things were a valid seizure and a condemnation of the property to pay the debt.

The only thing in the way of an affidavit on which the order of publication could have been made is a document pretending to be an affidavit made before a Notary Public outside the state. We will discuss its legal status later.

Our contention is also that inasmuch as Aaron Johnson had no title, legal or equitable, to the property, at the time of the attempted attachment thereof, such attachment was a nullity.

It is absolutely essential to the validity of the judgment rendered in the Circuit Court of Douglas County that property of Aaron Johnson should have been attached as a basis for the service of summons by publication. This point was determined once for all in Pennoyer vs. Neff.

It affirmatively appears in this case that the said Aaron Johnson was not the owner of the property at the time of the attempted attachment. There is no proof of his ownership, and, on the contrary, the deeds introduced in evidence show that he had, long before the action was filed, conveyed the property in question to another. No reconveyance was made to him until over a week after the attempted attachment. It not appearing that at the date of the levy he had the title to the property, legally or equitably, but the proof indicating the contrary, it follows that the same was not subject to attachment in an action against him, and the foundation for publication service falls away.

No affidavit was filed showing that he was the owner of this or any other property in the State of Oregon, and the Court never made any finding that he was the owner of such property.

It is to be borne in mind that Andrew Johnson, who owned the land on April 1, 1907, the day it was attached, was not a party to the action.

This chain of deeds by which title had passed out of Aaron Johnson long before the attempted attachment, and did not come back to him until eleven days after the levy, is all admitted by the appellant in the pleadings and

the argument. The only suggestion we get in answer to these solid and admitted facts is the theorizing of counsel for appellant, based on the recitations of these several warranty deeds. Appellant's counsel says, that the only consideration expressed in the deed of Andrew to Aaron delivered April 12, 1907 (printed transcript, page 123), is one dollar; in which statement counsel is in error, the deed reciting one dollar and other valuable considerations; and appellant's counsel draws the conclusion from this erroneous statement of fact that the title must all the time have been in Aaron. And because Aaron, who was simultaneously receiving the warranty deed whereby the title became vested in him, was on the same day delivering a warranty deed in which he warranted himself to be the owner, the conclusion is drawn that he was and had been for several weeks before that, the owner.

If such declarations are entitled to consideration (we believe them to be pure hearsay), the record shows that the deed by which Aaron had conveyed to Andrew was with general warranty. That amounts to Aaron's declaration that Andrew thereby became owner. Then the record shows a deed not signed until April 8th, and not delivered until April 12th, 1907, by which Andrew warrants that he is, at the date of the execution of the deed, the owner in fee simple. Surely these two declarations offset the declaration of Aaron, not intended to take effect until he should have received a re-conveyance of the property, that after such re-conveyance he was owner; and counsel for appellant has nothing upon which to base his theorizing.

POINTS AND AUTHORITIES.

1. *Where the statute prescribes the persons by whom affidavits may be taken, the enumeration of particular officers amounts to an exclusion of all others not enumerated as qualified, and an affidavit is not receivable and in fact is no affidavit in the contemplation of the law unless it be taken before some one of the officers mentioned in the statute.*

Fawcett v. Chicago Ry. Co., 113 Tenn. 246; 81 S. W., 839.

Ramy's Representatives v. Kirk, 9 Ky., 267.

Scull v. Alter, 16 N. J. Law, 147, 151.

Love v. McAllister, 42 Ark., 183 & 185.

Murdock v. Hillter, 45 Mo. App., 287.

Brunswick Hdw. Co. v. Bingham, 107 Ga., 272; 33 S. E., 56.

Desnoyers Shoe Co. v. 1st Natl. Bank, 188 Ill., 371; 58 N. E., 994.

Jackson v. State, 67 N. E., 690 (Ind.)

Metcalfe v. Carr, 133 Mich., 123; 94 N. W., 734.

Turtle v. Turtle, 52 N. Y. Sup., 857.

Manheimer v. Dosh, 74 N. Y. Sup., 922.

Fitch v. Campan, 31 Ohio St., 646.

Ferris v. Coml. Natl. Bank, 158 Ill., 241; 41 N. E., 1118.

Parke Davis & Co. v. Rouden, 117 N. Y. Sup., 945.

Stanton v. Ellis, 16 Barb., 319; affirmed 12 N. Y., 575.

We quote from some of the foregoing decisions:

In Fawcett v. Chicago Railway Co., *supra* (p. 840), the Court holds that an oath taken before a Notary of another state is void. "The administration of the oath is a judicial matter. An indictment for perjury may be predicated upon such an oath falsely and corruptly taken when taken before an officer authorized to administer it. * * * * In addition we have no statute conferring on a foreign notary public the power to administer this oath. * * * * Without these enabling provisions such acts would be nugatory; for this power to administer oaths does not pertain to the office of notary public by usage or custom, except so far as is required in the transaction of commercial affairs. Wherever such power exists it is by virtue of a statute."

Ramy's Rep. v. Kirk, *supra*, holds an oath taken before a Justice of the Peace of another state is no evidence of the fact stated.

Scull v. Alter, *supra*, says (p. 151):

> "There was another fatal objection taken by counsel for the plaintiff in the argument; namely, that the affidavit of Alter purported to have been taken before a Justice of the Peace of the County of Philadelphia, in Pennsylvania. The third section of the act requires creditors to make their claims under

oath of affirmation; it does not say before whom, but upon principle and the uniform decisions of this court, affidavits when required by law must be taken before the officer prescribed, or if none is indicated by the statute, before a judge of the court that has jurisdiction of the subject matter and is to pass upon its sufficiency and effect. We cannot take notice of the acts of a foreign officer unless required to do so by statute or some settled rule of law, and this affidavit must therefore be treated as a nullity."

Love v. McAllister, *supra* (p. 185), holds an affidavit void which was made before the clerk of the court of another state.

"The officers before whom an affidavit may be made out of the state being mentioned in the statute, an affidavit before an officer not named is of no validity in this state."

Murdock v. Hillyer, *supra*, holds the judgment void where the affidavit of service made outside the state was taken before the deputy clerk of a court of record, he not being qualified by statute to take the affidavit.

In Brunswick Hdw. Co. v. Bingham, *supra*, the affidavit for publication was taken before a notary public of another state. The Court says (p. 57):

"In order, however, to accomplish the purpose and render service by publication valid, the provision of the statute must be fully complied with. As a basis the plaintiff must make an affidavit that the corporation has no public place of doing business, or

no individual in office upon whom service may be perfected. A written statement to this effect does not authorize the service by publication, and where it is required that an affidavit shall be made, reference is had to an affidavit which is legal and valid in contemplation of law. * * * In the present case the paper purported to have been verified before a person who signed himself 'Notary Public, Wayne County, Michigan.' * * * Tested by the general rule which obtains and the prior decisions of this Court, the paper filed by the defendant in error in the Superior Court of Glynn County to obviate the requirements of the ordinary rule as to service of process, must fail because it was not an affidavit in the sense of the statute."

Desnoyer Shoe Co. v. First National Bank, *supra*, holds that an affidavit taken before a notary public of another state without proof of his authority to take oaths under the law of the state of his residence, is not an affidavit at all. The Court says (p. 995):

"By the general law merchant, a notary public did not have the power to administer oaths. Such authority is only conferred by statute and will not be presumed to exist, but must be proven. *** * The supposed affidavit of J. B. Desnoyers above set forth, sworn to in the State of Missouri, under said statute as heretofore construed by this Court, was void for the reason that the notary made no certificate of his authority to administer oaths under the laws of the State of Missouri, and there was no other evidence of such fact filed therewith."

Jackson v. State, *supra*, was a case where affidavits on motion for a new trial, after a conviction of murder, were verified before a notary public in another state. The Court says (p. 691):

"Assuming, however, that the motion for a new trial properly presents the question of newly discovered evidence, we should be compelled to hold that there were no affidavits in support of the motion as required by many decisions of this Court, for the reason that what purports to be affidavits taken in the State of Tennessee are not authenticated in accordance with the requirements of Sections 483 and 1865 of Burns' Revised Statutes, 1901, and cannot, therefore, be received and used as such in the courts of this state. Authority to take and certify affidavits does not belong to the office of a notary public at common law, but whether it does or not is immaterial, since a legislative enactment is paramount to the common law, and the above statute specifically prescribes how an affidavit taken in a foreign state must come authenticated to receive faith and credit in our courts. ** * * * The fixing of the specific mode of authentication must be held to exclude all other modes, and hence the courts have no authority to heed an affidavit that is not vouched in the manner provided by law. * * * ** They were, therefore, ineffectual as affidavits and entitled to no greater consideration than sworn statements. The newly discovered evidence, therefore, was not brought before the court in such way as warranted its consideration."

There are other Indiana cases to the same effect.

Metcalfe v. Carr, *supra*, holds an affidavit made before a notary public of another state containing no clerk's certificate of the authority of the notary, to be void; the statute requiring such authentication.

Turtle v. Turtle, *supra*, was a case where an affidavit was presented, sworn to before a notary public of another state. The Court held that it was not entitled to be read, not being taken before one of the persons authorized by statute.

Ferris v. Commercial National Bank, *supra*, says of affidavits taken before a notary public in Canada. At page 119 it is said: "The purported affidavits taken in the Dominion of Canada were void and could not properly have been considered by the Court. The notaries public before whom the papers were sworn to gave no certificate of their authority to administer oaths in the Dominion of Canada. Revised Statutes, Chapter 101, Par. 6."

Parke, Davis & Co. v. Rouden, *supra*, holds that an affidavit taken before a notary public of another state without the certificate thereto called for by statute, cannot be read in evidence.

Stanton v. Ellis, *supra*, holds that an affidavit of publication made before a Master in Chancery is of no force or validity whatever, and furnishes no proof that the order to show cause was published.

2. *To sustain the judgment, the record must show affirmatively the facts which bring the case within the statute allowing a service of summons by publication.*

In case of service by publication, the record must show the facts which bring the case within the statute allowing such service. Neff v. Pennoyer, Fed. Cas. No. 10,083; 17 Fed. Cas, p. 1288.

A statute required summons on a non-resident defendant to be published four weeks. The decree recited, "And it further appearing that the defendant had been served by publication as required by law." Held, that jurisdiction over the person of the defendant will not be presumed, it appearing by the filing of the complaint that four weeks could not have intervened between the time of filing and the rendition of the decree. The compliance with the requirements of the statute must affirmatively appear from the record itself. Northcut v. Lemery, 8 Ore., 316.

"In a proceeding in which the Circuit Court exercises a special jurisdiction, conferred by statute, the facts showing jurisdiction must affirmatively appear." City of St. Louis v. Gleason, 8 S. W., 349.

"Courts of general jurisdiction, when engaged in the exercise of special and limited statutory powers, are confined strictly by the authority given, and jurisdiction must appear on the face of the proceedings." City of Kansas v. Ford, 12 S. W., 347.

There is no presumption in favor of the jurisdiction of a court of general jurisdiction exercising special powers, but the record must show the existence of jurisdictional facts. Glos v. Woodward, 67 N. E., 3; 202 Ill., 480.

The law presumes nothing in favor of the jurisdiction of a court exercising special statutory powers, as in condemnation proceedings, and the record must affirmatively show the facts necessary to give jurisdiction. Illinois Central RR. v. Hasenwinkle, 83 N. E., 815.

As to courts of general jurisdiction, in the exercise of special powers conferred by statute and not exercised according to the course of the common law, nothing will be presumed to be within the jurisdiction which does not distinctly appear to be so, and the jurisdiction, both as to the subject matter and as to the persons, must appear by the record. Cobe v. Guyer, 86 N. E., 1071; 237 Ill., 516.

A court of general jurisdiction which takes cognizance of a cause pursuant to statutory authority and not in conformity with the common law, becomes an inferior court, and its proceedings are subject to all the incidents applicable to an inferior court, so that its record must affirmatively show that jurisdiction of the person against whom a judgment was rendered, was secured in the manner prescribed, in order that the judgment should not be open to attack, as no presumptions can be invoked to supply any omissions. DeVall v. DeVall, 109 Pac., 755; 57 Ore., 128.

Where special powers conferred upon a court of general jurisdiction are brought into action according to the course of common law * * * * by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its gen-

eral powers. But where the special powers conferred are exercised in a special manner not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record. Galpin v. Page, 18 Wallace, 350.

In summary proceedings where a court exercises an extraordinary power under a special statute which prescribes its course, that course ought to be strictly pursued and the facts which give jurisdiction ought to appear on the face of the record; otherwise the proceedings are not merely voidable, but absolutely void, as being *coram non judice*. Thatcher v. Powell, 6 Wheaton, 119.

A domestic judgment purporting to have been rendered upon service by publication is held subject to collateral attack, because the record does not contain an affidavit of non-residence and an order for publication, which were required by statute as conditions of service by publication. Palmer v. McMaster, 8 Montana, 186; 19 Pac., 585.

The "full faith and credit" clause is subordinate to one dominant principle, and but one; that is the principle which requires the jurisdictional status of the court to be clearly shown. A court acting without jurisdiction spreads upon its records a mere nullity. Virginia Public Works v. Columbia College, 84 U. S., 521.

Where a court is called on to exercise a power specially bestowed on it by statute, not within its ordinary powers and jurisdiction, the fact that the notice prescribed in the statute was given, it being a jurisdictional fact, must appear on the face of the proceedings. Donlin v. Hettinger, 57 Ill., 348.

3. *The presumption which the law implies in support of the judgments of superior courts of general jurisdiction arises only as to jurisdictional facts concerning which the record is silent; and when it discloses the evidence on which service by publication was had, and this was ineffectual, it will not be presumed that other evidence was presented, but the judgment will be void and open to collateral attack.* Johnson v. Hunter, 147 Fed., 133.

While the presumption of jurisdiction and the regularity of proceedings in a court of general jurisdiction protects its judgments from collateral attack when the record is silent regarding alleged defects, there is no room for that presumption * * * *** when the record discloses lack of jurisdiction. Indiana & Arkansas Lumber Co. v. Brinkley, 164 Fed., 963.

The recitals in a judgment as to due citation by publication are not conclusive, where the return of the sheriff and the actual publication appear in the record and are insufficient. Newman v. Crowls, 60 Fed., 220.

Where a journal entry of a finding recited that minor defendants had been duly served as by law required "as shown by the return of the sheriff," such return was made the basis of the finding and was an essential part

thereof; and where such return was insufficient, such finding was not conclusive in a collateral attack on the judgment entered thereon. Harris v. Sargeant, 60 Pac., 608; 37 Ore., 41.

Statute providing for service of summons by leaving a copy of the petition and writ at defendant's usual place of abode * * ** * judgment by default, on failure of return of service of summons to show that a copy of the petition and writ was left "at the usual place of abode" of defendant, is void and may be attacked in a suit based thereon. 65 S. W., 237 (Missouri).

Where the record shows defective service or want of service, no contrary presumption can arise. Newman v. Crowls, 60 Fed., 220.

If the record shows the manner of service, nothing will be presumed in an inquiry, but the court will determine whether it was good. Falkner v. Guild, 10 Wis., 563 (506).

Where facts defeating the jurisdiction of the Chancery court appeared affirmatively on the face of the record, there was no presumption of the regularity of the proceedings, so that its decree could be attacked collaterally or directly. Ayres v. Anderson-Tully Co., 116 S. W., 199.

4. *The recitals in a judgment as to due citation are not conclusive.*

Though the record recites acquisition of jurisdiction by publication , the presumption does not prevail against insufficient return of sheriff on record. Newman v. Crowls, 60 Fed., 220.

"The recital of due notice in the record of a proceeding under special statutory authority must be read in connection with that part of the record which gives the official evidence prescribed by statute. No presumption will be allowed that other or different evidence was produced; and if the evidence in the record will not justify the recital it will be disregarded." Cissell v. Pulaski Co., 10 Fed., 891 (894).

* *** * * * Where the record shows substituted service was not made as prescribed by statute, a recital in the judgment of "process being duly executed" is not conclusive. New River Mineral Co. v. Seeley, 120 Fed., 193 (see p. 201).

The recital in proceedings for divorce of facts necessary to give jurisdiction may be contradicted in suit between the same parties in another state. Bell v. Bell, 181 U. S., 175.

Record recitals of jurisdictional facts do not render such judgment conclusive in suit in another state wherein such judgment is relied upon. The defendant may contradict the record showing service of process. Knowles v. Gas Light Co., 19 Wallace, 58, 61.

Held, that a general finding or recital in a domestic judgment or order of "due service" would not avail to support the judgment or order upon collateral attack where the actual service shown by the record was not in compliance with the statute. Michel v. Hicks, 19 Kansas, 578.

The finding of a court in favor of its jurisdiction is not conclusive, especially when the record discloses the

evidence of jurisdiction upon which the court acted. Senichka v. Lowe, 74 Ill., 274.

Recitals in a decree which the process and return show cannot be true are not authority for the decree. The process will control, not the recital. Davis v. Reaves, 7 Lea. (Tenn), 585.

Though a judgment recites jurisdiction, yet if want thereof affirmatively appears on the evidence of the whole record, it will be held void on collateral attack. Wick v. Rea, 103, Pac., 462.

5. *Any fact may be alleged or proved which goes to take away the jurisdiction.*

Any fact upon which the jurisdiction depends may be denied unless, *perhaps,* in the case where the objection had been taken in the court whose jurisdiction is questioned and it has been made the subject of an express decision of the court. Hickey v. Stewart, 44 U. S., 750.

Any fact may be alleged or proved which goes to take away the jurisdiction; for example, jurisdiction of the person is acquired by due service of the process prescribed by law or by such notice as the law prescribes, and in the absence of such notice a judgment will be voidable. Wort v. Finley, 8 Blackf., 335 (Ind.)

A domestic judgment rendered on service by publication, held subject to collareral attack because it appeared from the record that the affidavit of non-residence prescribed by the statute was filed after and not before the service, as required by the statute, and notwithstanding the recital in the judgment that the sum-

mons had been duly served. If the record sets forth the manner in which the summons was served and that is ineffectual to confer jurisdiction, it will not be presumed that a valid service was made in some other way. Barber v. Morris, 37 Minn., 194, 33 N. W., 559.

A domestic judgment purporting to have been rendered upon service by publication held subject to collateral attack because the record did not contain an affidavit of non-residence, and an order for publication, which were required by statute as conditions of service by publication. Palmer v. McMaster, 8 Mont., 186, 19 Pac., 585.

6. *The Federal Court will not give to the judgment of a State Court any greater weight than the State Court would give.*

"Federal courts in a special statutory proceeding will not give to a judgment of a state court any other effect as evidence or as ground of action than must be lawfully given to it in courts of the state whose laws are invoked to enforce it." Chase v. Curtis, 113 U. S., 460.

The Federal court will not declare a state judgment *res adjudicata* where it would not be estopped under state law. Cooper v. Brazelton, 135 Fed., 476, 479.

7. *A statute authorizing a suit to be commenced against a non-resident upon constructive service of summons by publication is in derogation of the common law, and its provisions must be strictly performed in order to sustain the judgment recovered. A failure to comply with any of its requirements will be fatal.*

Gray v. Larrimore, Fed. Cas. No. 5721.

Earle v. McVeigh, 91 U. S., 508.

Settlemier v. Sullivan, 97 U. S., 449.

8. *The tendency of modern decisions everywhere is, that the jurisdiction of the court or other tribunal to render judgment affecting individual rights is always open to inquiry, when the judgment is relied on in any other proceedings.*

Kilbourn v. Thompson, 103 U. S., 197.

Price v. Shaeffer, 161 Pa., 530; 25 L. R. A., 699; 29 Atl., 279.

Thompson v. Whitman, 85 U. S., 457.

Coons v. Throckmorton, 25 Or., 59.

Galpin v. Page, 85 U. S., 350.

Neff v. Pennoyer, 3 Sawyer, 274.

Odell v. Campbell, 9 Ore., 298.

Phoenix Bridge Co., v. Castleberry, 131 Fed., 175.

Cooper v. Brazelton, 135 Fed., 479.

Cohen v. Portland Lodge No. 142, B. P. O. E., 144 Fed., 270.

Newman v. Crowls, 60 Fed., 220.

Nobel v. Union River L. R., 147 U. S., 173.

Windsor v. McVeigh, 93 U. S., 274.

Old Wayne Mutual Life Assn. v. McDonough, 27 S. Ct. R., 238.

Rich v. Mentz, 134 U. S., 642.

9. *The affidavit showing the essential facts required by the statute is a jurisdictional prerequisite to constructive service of summons. Where such affidavit is wholly lacking, or even where it is entirely lacking in some of the essentialfacts which the statute prescribes are to be shown by affidavit, the order for publication is void, the court being without jurisdiction to order service by publication, and any judgment resting on such a publication is void.*

Columbia Screw Co. v. Warner Lock Co., 138 Cal., 445; 71 P., 498.

Guinn v. Elliott, 123 Iowa, 183; 98 N. W., 625.

Gilmore v. Lampman, 86 Minn., 493; 90 N. W., 113.

Roosevelt v. Ulmer, 98 Wis., 356; 74 N. W., 124.

Romig v. Gillett, 10 Okla., 186; 62 P., 805.

Kahn v. Matthai, 115 Cal., 692; 47 P., 698.

Mills v. Smiley, 9 Idaho, 330; 76 Pac., 783.

Spalding v. Fahrney, 108 Ill. App., 602.

Tobin v. Brooks, 113 Ill. App., 79.

Diggs v. Ingersoll, 28 So., 825 (Miss. 1900).

Moord v. Summerville, 80 Miss., 323; 31 So., 793.

Wright v. Hink, 193 Mo., 130; 91 S. W., 933.

Grigsby v. Wopschall, 127 N. W., 605 (S. D. 1910).

Kennedy v. Lamb, 182 N. Y., 228; 74 N. E., 834.

Simensen v. Simensen, 13 N. D., 305; 100 N. W., 708.

Anderson v. Anderson, 229 Ill., 538; 82 N. E., 311.

Cordray v. Cordray, 91 Pac., 781 (Okla.)

Johnson v. Miner, 144 Cal., 785; 78 Pac., 240.

Bothell v. Hoellwarth, 10 S. D., 491; 74 N. W., 231.

In Johnson v. Miner, 144 Cal., 785, the law is well stated as follows:

"By the filing of the complaint the court acquired jurisdiction of the subject matter of the action, and was thereby placed in a position where it could proceed to acquire jurisdiction of the person of defendant. The defendant being a non-resident of the state, the law required the issuance of a summons, the issuance of a writ of attachment, and valid levy of the same upon defendant's real estate situated in this state; also an order for publication of summons, based upon the necessary affidavit, and a due service of sumomns by publication. All these steps must be taken to give the court jurisdiction to enter final judgment against the defendant to the end that the said property of defendant might be applied in a lawful way to the satisfaction of the plaintiff's cause of action. * * * The jurisdiction of the court to make the order of publication rests altogether upon the affidavit for publication showing the facts required by

the provision of Section 412, of the code of Civil Procedure. * * * The proceeding for the publication of summons is distinct and separate from the proceeding in attachment. The judgment against a non-resident is dependent upon both these proceedings, but neither of the proceedings is dependent upon the other."

10. *The rule that the filing of an affidavit making the statutory showing is a jurisdictional prerequisite to a valid service by publication prevails in Oregon.*

Pike v. Kennedy, 15 Ore., 425.

Colburn v. Barrett, 21 Ore., 29.

Goodale v. Coffey, 24 Ore., 355.

Smith v. Whiting, 55 Ore., 393.

11. *This rule is recognized in the Federal Courts as well as in the State Courts.*

McDonald v. Cooper, 32 Fed., 745.

Flint v. Coffin, 176 Fed., 872.

Romig v. Gillett, 187 U. S., 111; 23 S. C. R., 40.

City of Detroit v. Detroit City Ry. Co., 54 Fed., 1.

12. *The rule that a judgment based on service of summons by publication is void, where the affidavit on which the order of publication is based wholly fails to show some of the essential facts required thus to be shown by statute, and a fortiori where no affidavit is filed, applies on collateral attack on the judgment in question.*

Soule v. Hough, 45 Mich., 418; 8 N. W., 50.

Cummings v. Brown, 181 Mo., 71; 81 S. W., 158.

Charles v. Morrow, 99 Mo., 638; 12 S. W., 903.

Albers v. Kozeluk, 68 Neb., 522; 94 N. W., 521; 97 N. W., 646.

Stillman v. Rosenberg, 78 N. W., 913 (Iowa 1899).

Trowbridge v Allen, 48 Colo., 419; 110 P., 193.

Albers v. Kozeluk, *supra,* was a case where the affidavit upon which publication was granted was made before a justice of the peace who failed to state the venue; and this was the point relied on to invalidate the judgment on collateral attack. The Court says:

"In the light of these decisions, we think that this court has unmistakably committed itself to the New York doctrine that the affidavit must show upon its face the proper venue, or must disclose that the officer before whom it was executed was an officer of the county where the same was filed. We conclude, therefore, that the affidavit for service by publication was fatally defective, that no legal service of publication could be made thereunder, and that the court had no jurisdiction to entertain and try the foreclosure proceedings.

"It is earnestly insisted by the defendant that this is a collateral attack upon the foreclosure decree, and that the jurisdiction of the court to enter

the decree will be conclusively presumed, and that neither the sufficiency of the notice nor affidavit can be questioned or reviewed collaterally. We do not think that this position is tenable. The affidavit is jurisdictional to service by publication, and where there is no affidavit, or where the affidavit is fatally defective, the publication is void. Atkins v. Atkins, 9 Neb., 191; 2 N. W., 466. McGavock v. Pollack, 13 Neb., 535; 14 N. W., 659. Rowe v. Griffiths, 57 Neb., 488; 68 N. W., 20.

"The plaintiffs are not seeking to attack the decree in this case because of irregularities, but the claim is that the judgment is absolutely void; that what appears on its face as a judgment is not one, because of want of jurisdiction by the court to enter it.

"In C. B. & Q. R. R. Co. v. Hitchcock County, 60 Neb., 722; 84 N. W., 97; it is said: 'In courts of general jurisdiction the rule is that the proceedings taken, including questions of jurisdiction, are presumed to be regular and in conformity with law. Where, however, the record discloses the jurisdictional steps taken, and it is made to appear that no jurisdiction was acquired over the defendant, the rule invoked is rendered unavailable. Where a court is without jurisdiction over a defendant, the judgment rendered is void, and may be attacked as such by any one whose rights are affected by its rendition, and its invalidity shown in any action in which it may be called in question.' "

13. *The rule that such judgments are void on collateral attack prevails in Oregon:*

Fishburn v .Londerhausen, 50 Ore., 374; 92 P., 1060.

Northcut v. Lemery, 8 Ore., 323.

Neff v. Pennoyer, 3 Sawy., 278; Fed. Cas., No. 10,083.

14. *And the same rule is recognized in the Federal Courts likewise on collateral attack on the judgment:*

Johnson v. Hunter, 147 Fed., 133.

Cohen v. Portland Lodge No. 142, 152 Fed., 357.

Meyer v. Kuhn, 65 Fed., 705.

Guaranty Trust Co. v. Green Cove Ry. Co., 139 U. S., 137-146.

Ritchie v. Sayres, 100 Fed., 520.

Frawley v. Pa. Casualty Co., 124 Fed., 259.

Howard v. DeCordova, 177 U. S., 613; 20 S. C. R., 817.

Howard v. DeCordova, 177 U. S., 613; 20 S. C. R., 817, was a suit brought to set aside on collateral attack a judgment of a state court on the ground that the affidavit upon which publication of summons was obtained was false. The syllabus is as follows:

A Federal court may take jurisdiction of a suit to set aside a judgment of a State court in the same state, when it is attacked for fraud and want of

jurisdiction because it was rendered on service by publication, the order for which was obtained by a false affidavit.

The Court, after reviewing some earlier decisions, says that thereby it has been decided that when the charges go to the jurisdiction of the state court such question can be examined in the court of the United States whenever the judgment of the state court is presented as a muniment of title, and continues:

> "The alleged facts in the case before us bring it directly within this ruling. By Chapter 95, Sections 13 and 14, Laws of Texas, 1847 and 1848, p. 129, the affidavit by the plaintiff or his attorney as to the want of knowledge of the names of the parties defendant or their residence is made an essential prerequisite of the jurisdiction of the court to issue an order for publication. In other words, a summons by publication can only take place when the essential affidavit is previously made. In the state court the affidavit was therefore jurisdictional in its character; and its verity was directly assailed by the averments of the present bill, which were admitted by the demurrer."

Much emphasis is placed by the Appellant on the proposition that the action in Douglas County by attachment was a proceeding *in rem*. A sufficient answer to this would be, even if the Court were so to find the fact, that no property of the defendant was in fact attached. But even if there were a valid attachment, we contend that the proceeding was not so far *in rem* that it would

be valid without due notice as prescribed by statute to the defendant by publication; and that such notice by publication would not be valid unless the Court had jurisdiction because of a proper showing in accordance with the statute, to make an order for the service of notice in that manner. An examination of the authorities respecting actions of that character will show that the proceeding is only quasi *in rem,* and it is not sufficient that there be a seizure of property under attachment; but there must also be a strict compliance with the statutory requirements as to constructive notice to the defendant himself. We quote from Wade on Attachments, Section 7:

> "A suit by attachment is a personal one when first instituted. It may continue to the end a personal action or be changed in the course of its progress to a proceeding possessing the leading characteristics of an action *in rem.* The suit loses its personal character when there has been due service of the writ upon the property and a failure of personal service upon the defendant and he does not voluntarily appear. In case of the appearance of or personal service on the defendant the action proceeds as a personal one, with the added incident that the property attached remains under the control of the Court to answer any demand which may be established against the defendant by the final judgment in the case. Strictly speaking, under adhesion to definitions proceedings *in rem* are those where the mere control of the thing by the service of process on it and making proclama-

tion authorizes the court to decide upon it without notice to any individual. The notice is general and the whole world are parties. *Attachment suits clearly do not answer to this description in any of the states.* In New York it is held that the provisions of the Code upon this subject are personal in their character and render the individual alone liable to be so proceeded against who has been guilty of one or more of the acts intended to be redressed by this mode of procedure. (Bogart v. Dart, 25 Hun., 395). When the defendant appears to the action in whatever manner he may be served the suit proceeds as an ordinary civil action and the judgment is personal. (Barnum v. Reed, 73 Mo., 461). And in Missouri it was held by the majority of the court that an attachment suit was not such a proceeding *in rem* as that the *res* is a party to the suit; but the attachment was in aid of the remedy against the individual sued. (Bray v. McClury, 55 Mo., 128). * * * When property is seized by name and the action is brought against the thing, instead of the owner, the proceeding is purely *in rem* * * * and when the action is against a non-resident or absent defendant, where there is neither appearance nor personal service, it is styled an action *in rem* for the reason that the judgment does not go beyond a condemnation of the property attached to the payment of the debt. *And yet the action is personal for the purpose of determining the question of indebtedness, whereas in proceedings strictly in rem the thing is adjudged derelict.* For the purpose of distinguish-

ing the proceeding by attachment from an independent action it is styled a provisional remedy."

We quote also from Cyc., Vol. 4, page 397, where it is said, citing numerous authorities:

"Attachment is sometimes spoken of as a proceeding *in rem*, but strictly speaking this is incorrect, as a proceeding *in rem* is taken irrespective of the parties and is binding on the whole world, while the attachment affects the particular debtor only and is binding on him alone. When no jurisdiction is obtained over the debtor's person the remedy partakes of the nature of a proceeding *in rem* in that it proceeds against the property in the custody of the Court and the judgment binds such property only; but where jurisdiction of the debtor's person is obtained, either by personal service or appearance, the proceeding is ordinarily *in personam* and a personal judgment is rendered. * * * Under the statutes of most states it is not a writ or process by which action is commenced, but a mere provisional remedy ancillary to the action commenced at or before the time when the attachment is sued out."

"*In rem* is a technical term used to designate proceedings or actions instituted against the thing, in contradistinction to personal actions which are said to be *in personam*." Cunningham v. Shanklin, 60 Cal., 118, at p. 125.

"Action *in rem* is understood to be a technical term taken from the Roman law and there used to distinguish an action against the thing from one against the person,

the terms "*in rem*" and "*in personam*" always being the opposite one of the other, an act *in personam* being one done or directed against a specific person, while an act *in rem* was one done with reference to no specified person, but against or with reference to the specific thing, and so against whom it might concern, or all the world." Cross v. Armstrong, 10 N. E., 160, at p. 164 (Ohio).

"If it be correct to say that no personal judgment can be rendered against a non-resident without actual personal service it would seem an idle formula to have citation by publication. * * * It is true that in proceedings strictly *in rem,* as in admiralty proceedings, there is no personal service and all the world are regarded as parties and bound by the proceedings. *But our proceedings by attachment, either against a citizen or a non-resident, are not proceedings in rem nor to be likened to it.* Paschal's Digest, Art. 156 reads: 'That no judgment shall be rendered in suits by attachment unless the citation or summons has been served in the ordinary way or by publication in the manner provided by law.' Certainly this statute contemplates a personal judgment, although service by publication. Personal judgments on service by publication are common to the proceedings in courts of most of the states of the Union, and their validity and force has been almost universally recognized within the jurisdictioin where they are rendered." (Citing 9 How., 350; 24 How., 203). Wilson v. Zeigler, 44 Tex.. 657, at p. 660.

"Proceedings by attachment are not strictly speaking proceedings *in rem.* Such proceedings are simply against specific property or interests therein. No person

is named in the proceeding as a party. The whole world is bound. The seizure is notice. It confers jurisdiction. No other prerequisite to jurisdiction is prescribed. Under our system the seizure of the property does not confer absolute jurisdiction. That jurisdiction is conditional. It will be defeated by failure to comply with a jurisdictional condition subsequent. * * * Service is essential to the preservation of a qualified jurisdiction which has already attached. It is not the case of a mere irregularity in procedure, but is jurisdictional in its character." Rhode Island Hospital v. Keeney (N. D.), 48 N. W., 341.

A suit commenced by attachment is not a proceeding *in rem,* but is personal against the defendant; and the judgment therein authorized is not merely one of condemnation of the property attached, but is personal and general, as in a suit commenced by summons and complaint. Betancourt v. Eberlin, 71 Ala., 461.

As to the property seized these (attachment) proceedings have frequently been styled proceedings *in rem,* but it is not altogether incorrect so to designate them, since the property is in *custodio legis* and is specifically subjected to the satisfaction of the plaintiff's demand; but such suits are also proceedings *in personam,* since it is the personal obligation of the defendant owner, which is the foundation of the suit, and it is not necessary that the property seized should have had any sort of connection with the contract sued on. The property seized is not the debtor of the plaintiff, but stands in the suit in which it is attached as the representative of its owner, the defendant. The right to attach is simply the right

to seize the property of the debtor and to deal with it as his representative. By the seizure of the thing the right becomes initiate and is consummated by the recovery of the judgment against the owner. If the defendant is served with process or appears and defends a general judgment may be rendered against him, upon which a general execution may issue. If the court fails to obtain jurisdiction of the person of the defendant, a general judgment is rendered, but its execution is restricted to the property seized.

15. *If a non-resident debtor have no property within a state, there is nothing upon which the state court can adjudicate in determining the demand of a plaintiff in its court against such non-resident debtor.*

Pennoyer v. Neff, 95 U. S., 723.

Noyes v. Barnard, 63 Fed., 785.

Iowa State Savings Bank v. Jacobson, 8 S. D., 298; 66 N. W., 453.

Paxton v. Daniell, 1 Wash., 22; 23 Pac., 444.

Foushee v. Owen, 122 N. C., 363; 29 S. E., 771.

McDonald v. Cooper, 13 Sawyer, 95; 32 Fed., 751.

Cooper v. Reynolds, 10 Wall., 318.

The Supreme Court of the United States in Cooper v. Reynolds, 10 Wall., 318, says:

"The court in such a suit cannot proceed, unless the officer finds some property of defendant on

which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proved in court. Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property—or that which, in this case, is the same in effect, the levy of the writ of attachment on it is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this, the court can proceed no further; with it, the court can proceed to subject the property to the demand of the plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form, under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court the power of the court over the *res* is established."

And in the subsequent and well-considered case of Pennoyer v. Neff, 95 U. S., 723, Mr. Justice Field said:

"It is in virtue of the state's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident have no property in the state, there is nothing upon which the tribunals can adjudicate."

16. *"The execution of a writing is the subscribing and delivering of it, with or without affixing a seal."*

L. O. L., Sec. 777.

Fain v. Smith, 14 Or., 82.

Shirley v. Burch, 16 Ore., 83.

Allen v. Ayer, 26 Ore., 589.

Tyler v. Cate, 29 Ore., 515.

Payne v. Hallgarth, 33 Ore., 430.

Swank v. Swank, 37 Ore., 439.

Young v. Gilbau, 3 Wall., 636.

Parmalee v. Simpson, 5 Wall., 81.

Ireland v. Geraghty, 15 Fed., 35.

Brumby v. Jones, 141 Fed., 318.

The answer of the appellant herein admits that Aaron Johnson deeded the property to Andrew Johnson as alleged in the complaint; and it is not controverted that such a deed was made and recorded long before the attachment, and that the record title stood in Andrew's name on April 1, 1907, the date of the attempted levy of the writ. The defendant alleges, referring to this transaction that "The fact is that, as your orator, John W. Johnson is informed and believes, such conveyance was either fraudulent and made for the purpose of defrauding the creditors of Aaron Johnson, of whom this, your orator, was one, or the same was intended as a mortgage to secure the payment of sums of money and was not in fact a conveyance of said estate; but that

whether this be true or not by the deed of April 8, 1907, the said Aaron Johnson became the owner in fee simple of such property heretofore described."

Now, we submit to your Honors that there is not one bit of evidence introduced in the case to sustain these allegations, either that the conveyance to Andrew was a mortgage, or was in fraud of creditors. This is a point on which the defendant assumed the burden of proof and has failed to produce evidence. An ingenious attempt is made to use the warranty clause of Aaron Johnson's deed to the plaintiff as a declaration on his part that he was owner at the time he signed the same, for which purpose it is clearly incompetent.

Moreover, it is to be borne in mind that the deed must speak from the date of its delivery, and it was the evident intent that the same should not be delivered, and it was not delivered, until Aaron reecived a conveyance from Andrew, which would make the warranty of vested title true. There is in the record a warranty deed of Andrew bearing a later date and reciting with as much positiveness that Andrew is the owner in fact. If one is evidence so is the other, and they offset each other, with the advantage on Andrew's side of holding the legal and record title. The transaction is entirely consistent throughout with a repurchase by Aaron from Andrew for the purpose of selling to the plaintiff. The Court will not presume fraud without evidence, but will presume the contrary; nor can the Court presume a mortgage without a scintilla of proof thereof. The burden was on the defendant herein to overcome the presumption of ownership arising from the legal title vest-

ed of record in Andrew by a regular conveyance; also the presumption of honesty in the transaction as opposed to fraud; also the burden of proof assumed by the affirmative allegations of the defendant's answer in this respect. On all these points the defendant has failed.

If the property did not belong to Aaron on April 1, 1907, we maintain that the levy of an attachment thereon was a nullity, and the whole proceeding falls to the ground.

The defendant partly admits his failure to make any showing of title in Aaron Johnson on the day of the levy, and to overcome this defect advances two propositions, neither of which is sustained by any law, the first being that the levy of the attachment having been made on April 1st, caught any after-acquired title which vested in Aaron Johnson by the deed of Andrew executed on the 8th, or whatever may have been its date of delivery thereafter; and the other contention being that the defendant is in some way a *bona fide* purchaser under his attachment.

We maintain that an attachment has no such legal effect as claimed. In the case of Lackett v. Rumbaugh, 45 Fed., 28, it is said:

> "At the time when the garnishment was served on C. the precedent condition has not been performed by P. He had no absolute title to the money; no right of action; and all his claim to the fund had been transferred and he had no further power to control its disposition. The validity of the attachment depends upon the state of facts existing at the time

when levied. It cannot reach any liability of the garnishee accruing after the service of the process upon him. Devries v. Summitt, 85 N. C., 126. An attaching creditor cannot acquire any higher or better right to the property attached than the defendant in the main action had when the process was levied unless he can show some fraud and collusion by which his rights were attempted to be impaired." Cites authorities.

In Crocker v. Pierce, 31 Maine, 177, it is held that an attachment of land attaches only to the interest of the defendant therein at the time it is made and a subsequently acquired title does not inure to the benefit of the attachment plaintiff. To the same effect are:

McMillen v. Gerstle, 19 Colo., 98; 34 Pac., 681.

Meyer v. Paxton, 4 Tex. Civ. App., 29; 23 S. W., 568.

The foregoing part of this brief is devoted mainly to setting up the propositions and arguments on which we make out our affirmative case, though parts of it are applicable to meet the arguments of opposing counsel. We shall take up now more directly the consideration of the assignments of error and the propositions of law and arguments as to the facts upon which the appellant seeks a reversal.

We discuss first an assignment of error which seems to be abandoned in the brief, for it is not argued at all, viz: the third, which is that "The Court erred in holding that the requisite diversity of citizenhsip existed

to entitle the Court to entertain jurisdiction, for this, that the plaintiff is a citizen of Minnesota and the defendants are citizens of the state of Washington."

We presume that counsel for the appellant, since assigning that error, have been reading some of the decisions which place the jurisdiction of the court to hear a case involving title to land within the district, and between citizens of different states, beyond dispute.

Jellenik v. Huron Copper Mining Co., 177 U. S., 1; 20 S. C. R., 562.

Greeley v. Sawe, 155 U. S., 58.

Seybert v. Shamokin etc. Co., 110 Fed., 810.

Kuhn v. Morrison, 75 Fed., 81.

Tingle v. Scott Paper Mfg. Co., 55 Fed., 553.

Spencer v. Kansas City Stock Yard Co., 56 Fed., 741.

Ames v. Holderbaum, 42 Fed., 341.

Lancaster v. Asheville St. Ry. Co., 90 Fed., 129.

Grove v. Grove, 93 Fed., 865.

U. S. v. Winans, 73 Fed., 72.

Dick v. Foraker, 155 U. S., 404.

Arndt v. Griggs, 134 U. S., 316.

Morrison v. Marker, 93 Fed., 692.

Citizens Savings & Trust Co. v. Ill. Cent. R. R., 27; S. Ct., 425.

It is also clear beyond question that a suit to quiet title to land within the district is one of the kind of cases which come within the law giving the federal courts jurisdiction, as laid down in the authorities just cited.

Holland v. Challen, 110 U. S., 15.

Chapman v. Brewer, 114 U. S., 158, 170.

United States v. Wilson, 118 U. S., 89.

Moore v. Steinbach, 127 U. S., 70, 84.

Darragh v. Wetter Mfg. Co., 78 Fed., 7.

Lamb v. Farrell, 21 Fed., 5, 8.

Northern Pacific R. R. Co. v. Cannon, 46 Fed., 232.

Southern Pacific R. R. Co. v. Stanley, 49 Fed., 263, 265.

Prentice v. Duluth Storage & Forwarding Co., 58 Fed., 437.

Harding v. Guice, 80 Fed., 162.

Green v. Turner, 98 Fed., 756.

Willitt v. Baker, 133 Fed., 937.

U. S. Mining Co. v. Lawson, 134 Fed., 769.

Smith Oyster Co. v. Immel Oyster Co., 149 Fed., 555.

Fitch v. Creighton, 24 How., 159.

Reynolds v. Crawfordsville Bank, 112 U. S., 405, 411.

Devine v. Los Angeles, 26 S. C. R., 657.

This being beyond all controversy a case of which the court has jurisdiction, first by virtue of the citizenship of the parties, and second, by virtue of the subject matter, and third because it is of equitable cognizance, we pass to the consideration of the proposition laid down for argument as set out on page eleven of appellant's brief, viz: that "The federal court will not, in this proceeding, search the record of the Oregon state court for defects and informalities or errors apparent upon and judged by the face of the record." This seems to be intended as a summary of the first, second, fourth and eighth assignments of error. Briefly stated, the doctrine might be put thus: That although the case, namely, a suit to quiet title to real property within the district, is one of which the court has jurisdiction, and of which it is bound to take cognizance, and although the necessary diversity of citizenship exists; and although both parties have come into court and submitted their cases and prayed that the whole controversy be judged, and each has prayed for affirmative relief: yet there is something so sacred about a judgment of a state court void on its face for want of jurisdiction; that as soon as it appears that one of the parties is claiming under such a void judgment, the court must refuse further to hear the case of the real owner of the property, who seeks to have his title quieted, and must decree that the void title of the opposite party be confirmed.

Now, is there any rule of law in this counrty which prohibits a federal court to uphold the plaintiff's title against a void judgment, or a deed founded on a void judgment, of a state court, merely for the reason that

the fact which makes the judgment void appears on the face of the record? We think that it has never been so held. We admit that there are abundant decisions that a court of equity will not take jurisdiction to quiet a title when there is a remedy at law open to the parties and equally adequate; and that a court of equity will not take jurisdiction to restrain the carrying out of a judgment of a state court, when there is a plain remedy open to the suitor in the original proceeding, pending at the time in the state court. We think it will be found on careful examination that none of the cases cited by appellant goes further, in withholding jurisdiction, than what we have stated is the limit placed by the foregoing rules.

Appellant's whole case may be said to rest on the dictum of the court in Little Rock Junction Railway v. Burke, 66 Fed., 83. That was a suit brought by Burke to quiet title against the railway company; *the railway company being in possession of the property.* The court says that:

> "Owing to the peculiar relations which exist between State and Federal courts of co-ordinate jurisdiction, the Federal court ought not to review, modify or annul a judgment or decree of the State court unless such review is sought on a state of facts not disclosed by the record of the State court."

This, if good law and applicable to the case, would not be a bar to our suit, because it is founded partly on the fact that no property belonging to the defendant Aaron Johnson was attached; which is not a fact ap-

parent on the face of the record, but has to be established by the deeds introduced in evidence. Therefore, our case would be taken out of the rule. It is well settled that if it is necessary and proper for a court of equity to take jurisdiction for the purpose of trying one issue, it will try all the issues.

Cathcart v. Robinson, 5 Peters, 264.

Ober v. Gallagher, 93 U. S., 199.

U. S. v. Union Pacific Railway Co., 160 U. S 1.

Ward v. Todd, 103 U. S., 327.

Mason v. Hartford P. & F. R. Co., 19 Fed., 53.

Foley v. Hartley, 72 Fed., 570.

Continental Insurance Co. v. Garrett, 125 Fed, 589.

But we contend that if the lack of an affidavit as the foundation for the order of publication were the sole defect relied on, and the suit were therefore a collateral attack based entirely on a defect apparent on the face of the record of the State court, the doctrine of Little Rock Junction Railway Co. v. Burke would not be applicable. When the case is studied, it will be found that the reasons why the Federal court refused jurisdiction were:

1. "That the complainant could have obtained as full relief by a bill of review in the Chancery court as by an original bill filed in the Federal Circuit court." (p. 88).

2. "That it is a general rule that unless restrained by the terms of an express statute a court of superior jurisdiction has power at any time to vacate its own judgments when it appears from an inspection of its record that a particular judgment or decree is utterly void for want of a jurisdiction either over the person or the subject matter." (p. 88).

3. "The remedy by ejectment was also open to the complainant, for no doctrine is better established than that a sale under a decree that was rendered without jurisdiction confers no title and that such a decree is open to impeachment in any collateral proceeding when the want of jurisdiction is apparent upon the face of the record." (p. 90).

In passing, we respectfully call the attention of the Court and of opposing counsel to the fact that this case all the way through holds that the judgment in question was void, notwithstanding jurisdiction of the *res;* and that, too, for the very same reasons we are contending here to be sufficient to render void the judgment in the case at bar, namely, defects in the proceedings to summon the defendant.

Showing the inapplicability to the case at bar of the reasons given in Little Rock Junction Railway Co. v. Burke for refusing relief, we find:

1. That bills of review are expressly abolished by statute in Oregon. Lord's Oregon Laws, Section 390.

2. That application for the vacation of a judgment cannot be made by the plaintiff here because he

was not a party to the case in which it was rendered; nor could it have appealed for the same reason; and even if it were otherwise it is held that the inherent jurisdiction of courts to vacate their orders or judgments continues in Oregon only to the end of the term during which they were rendered. Brand v. Baker, 42 Ore., 426.

3. Ejectment would not lie because the defendant is not in possession; it being admitted in the pleadings and at the trial that the land was vacant and unoccupied. Section 516, Lord's Oregon Laws, allows a suit in equity to be brought under such circumstances; that the Federal courts will grant the same relief is well established, as shown by cases cited above.

It is evident from the language used in the opinion in Little Rock Junction Railway Company v. Burke that if there had been any feature of the case which required the introduction of extrinsic evidence to establish the invalidity of the state court's judgment, jurisdiction would not have been denied; and there is such an issue in the case at bar, namely, the issue as to the ownership of the property at the time of the attachment.

National Surety Company v. State Bank, 120 Fed., 599, cited by appellant and by the lower court, is a good commentary on the meaning of the Little Rock Junction Railway Company case. It says of that case that it "failed because there was an adequate remedy at law by ejectment in the Federal court, if there was any remedy. The facts stated in the case appeared on the face

of the record in the State court and were as available in ejectment as in equity."

This case, taken as a whole, is favorable to the plaintiff herein.

The case of Union Pacific Railway Co. v. Flynn, 180 Fed., 565, on which appellant's counsel lay emphasis, was a suit for injunction against a pending proceeding in a state tribunal. It is held that:

> "Where a property owner against which a special tax bill has been ordered claimed that the proceedings were void for lack of proper notice, it had an adequate remedy at law in the State court, either by a proceeding under Section 4, or by a *certiorari,* and hence could not maintain a bill in the Federal Circuit court to restrain the city clerk from attesting and the circuit clerk from filing the tax bills against its property on the theory that to do so would constitute a taking of property without due process of law."

This, we submit, is a very different situation from the one presented by our case. For, while opposing counsel contended vigorously in the lower court that we had a remedy at law, by action of ejectment, they appear now to have abandoned that contention, knowing it to be unfounded, and would leave plaintiff without any remedy whatever in the premises, contenting themselves with taking away his equitable remedy.

It ought to be clear also, we think, from an examination of all the cases cited by the appellant herein, that the only reason why, and the only case when, a Federal

court will refuse jurisdiction is that an adequate remedy at law exists in the particular case presented. If this controlling fact does not clearly appear, then jurisdiction will be taken. For example, in Blythe v. Hinckley, 84 Fed., 253, the Court, referring to Little Rock Junction Railway Company v. Burke, says the ground of that decision was:

> "The Court holding that not only was a bill of review open to the complainant as a remedy, but the action of ejectment."

And on page 256, speaking of the situation in Blythe v. Hinckley, the Court says concerning it:

> "She was therefore in possession when the second amended and supplemental bill was filed; and against her at that time, so far as appears from the bill of complaint, a suit in ejectment by the complainants would have afforded a plain, adequate and complete remedy."

The case was so treated on appeal. 173 U. S., 501; 19 S. C. R., 499.

Under the law of Oregon, the only remedy open to the plaintiff under the existing facts is a suit of the character here brought; and we think it is clear from the authorities we have cited that the Federal court ought, when such is the only remedy, and the citizenship of the parties is such as to authorize it, to take jurisdiction.

Then it is contended that this Court will not "examine into the irregularities and informalities in the proceedings before the Oregon court."

If the points of attack on the Oregon judgment were "informalities and irregularities" we concede that Your Honors would not undertake to set aside the judgment on collateral attack; nor would any other Court. But we have never heard any court call a non-ownership of the property attached as the basis of constructive service, or the total absence of an affidavit on which to base an order for publication, an "irregularity or informality." On the other hand we have cited in this brief many cases holding that in the absence of property attached or an affidavit for publication, the ~~attachment~~ judgment is void on collateral attack. We find no cases to the contrary, nor does the diligence of opposing counsel disclose any. Indeed, the Court says, in Cooper v. Reynolds, upon which defendant most relies, that:

> "The Court in such a suit cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case and deprives the Court of further jurisdiction, though the publication may have been duly made and proven in court."

It is to be conceded that there is language in Cooper v. Reynolds which, taken literally, would seem to dispense with the necessity of any publication of summons in an attachment suit. It follows as a matter of course that if the summons could be dispensed with the affidavit for its publication could be dispensed with as well.

The Court will note in Cooper v. Reynolds, on page 319, the following:

"So, also, of the publication of notice. It is the duty of the Court to order such publication and to see that it has been properly made, and undoubtedly if there has been no such publication a court of errors might reverse the judgment. But when the writ has been issued, the property seized, and that property has been condemned and sold, we cannot hold that the Court had no jurisdiction for want of a sufficient publication of notice."

The foregoing means that the proceedings by attachment are *in rem* and that the vital process by which jurisdiction is acquired is the process against the property and not against the person; and no process against the person is requisite to the jurisdiction. This is the doctrine for which appellant contends herein, and which it is necessary for him to maintain in order to prevail.

That there *can be* proceedings *in rem* in which the process is against the property and no process by publication or otherwise against the party is necessary, we do not deny. In such cases the primary and essential fact to give jurisdiction is seizure of the property. If that be accomplished, then the Court has jurisdiction to render its judgment against all the world, and whatever else may be commanded is incidental and its non-observance will not subject the judgment to collateral attack.

But our contention is that under the laws of Oregon the attachment is ancillary only; that it is not a process by which the Court acquires jurisdiction, though it is essential that there be property within the jurisdiction of the Court and that the Court in some manner shall have control of the property before a judgment can be

rendered against a non-resident defendant who has not appeared or been served with summons within the state. We contend that the attachment is ancillary only and is not the method of summoning or warning a defendant to appear. An attachment of the property of the non-resident debtor is nowhere made a part of the process for bringing him into court by the statutes of Oregon. It is not made requisite by statute to the proceeding against him by publication of summons that there shall be an attachment. The section of the code covering the point (L. O. L., Sec. 56) says nothing about attachment, but says that the service of summons by publication may be made "When the defendant is not a resident of the state but has property therein and the Court has jurisdiction of the subject of the action."

The subject was quite fully considered by Mr. Justice Bean in Bank of Colfax v. Richardson, 34 Ore., 525, where it is said:

> "Under our system an attachment is merely auxiliary to the main action, and there is no difference in the proceedings thereon in an action brought against a non-resident, upon whom service is necessarily made by publication, and in one brought against a resident of the state, in which personal service is had. In either case the proceedings on attachment have nothing to do with the merits of the cause of action or the jurisdiction of the court to try and determine the controversy between the parties. If personal service is had, the cause becomes a mere action *in personam,* with the added incident that the property attached remains liable for

any judgment the plaintiff may recover. But, if service is had by publication, and there is no appearance for the defendant, the action is practically a proceeding *in rem* against the attached property, the only effect of which is to subject it to the payment of the amount which the Court may find due the plaintiff. Where no personal service is had, the *res* is brought within the power and control of the court by a seizure under a writ of attachment, but the right to adjudicate thereon is acquired only by the the publication of the summons. *It is the substituted service, and not the seizure*, which gives the court jurisdiction to establish by its judgment a demand against the defendant, and to subject the property brought within its custody to the payment of that demand. In other words, the authority to hear and proceed to judgment depends upon the service of the process and the actual seizure of the thing to be concluded by the judgment, and not upon the regularity of the proceedings by which the control of the property was acquired."

We take it that the "service of the process" in the foregoing refers to the service of the summons by publication, and we think it has always been so understood in Oregon.

A painstaking examination of every case given in Rose's Notes in which Cooper v. Reynolds is cited as having been followed, discloses that, with the possible exception of Freeman v. Thompson, 55 Mo., 183. and Brown v. Rose, 55 Neb., 200, no decision is referred to which has adopted the doctrine of Cooper v. Reynolds

respecting the non-necessity of publication of notice in attachment cases embodied in the extract above referred to.

Cooper v. Reynolds is criticised by Mr. Wade in his work on Attachment, Sections 6 and 46. It came up for consideration before the Supreme Court of Tennessee, in which state the case had arisen. The Tennessee court vigorously repudiated it as not laying down the law of that state in cases where the attachment is *ancillary*. See Walker v. Cottrell, 6 Baxt., 265, in which, after an exhaustive review, the Court says:

> "We are of opinion that the decision in the case of Cooper v. Reynolds, 10 Wal., is not in conformity to the decisions of this court, and to hold in conformity to the opinion in that case would overturn the uniform current of decisions made by this court upon the office and effect of the levy of an ancillary attachment."

In some of the states, Ohio, for instance, attachment, followed by publication of a monition, is the method akin to the ancient *distringas* adopted for bringing an absent defendant into court, or subjecting his property to sale, if he does not appear. In such states the above doctrine of Cooper v. Reynolds respecting the acquisition of jurisdiction by attachment is recognized and was recognized, as for instance in Ohio, before Cooper v. Reynolds was decided.

On the other hand, the courts of the various jurisdictions, state and federal, where attachment is merely ancillary, Oregon for example, as laid down by Judge

Bean in the case of Bank of Colfax v. Richardson, hold the rule to be exactly the contrary.

No suit is begun in Oregon by the seizure of the property under a writ of attachment, which is just the vital point on which the whole matter turns. An action is begun in Oregon, according to Section 751, Lord's Oregon Laws, by filing a complaint with the Clerk of the Court. This is a proceeding *in personam*. At any time *after the action is commenced* the plaintiff may cause a summons to be served on the defendant. The attachment, according to Section 295, cannot issue before the summons, the provision being that "The plaintiff at the time of issuing the summons or any time afterwards may have the property of the defendant attached *as security for the satisfaction of any judgment that may be recovered.*" It is therefore clearly evident that in Oregon an action cannot be commenced by the issuance of a writ of attachment. It is not any part of the process by which an action is begun, but is merely ancillary, as security for the judgment.

The holdings are uniform that a valid attachment is not enough, but there must also be substantial compliance with the statute respecting constructive service of summons; among the jurisdictional requisites being the showing prescribed by statute to authorize the Court to make the order for service in that manner. We have cited many cases to sustain this point. The number which might be given is almost without limit; for every case in which a judgment has been held void on collateral attack for some defect in the summons or the proceedings leading up to it, notwithstanding a valid attachment,

is a case in point against the particular doctrine of Cooper v. Reynolds for which defendant contends here.

In Cooper v. Reynolds, the Court sets forth at the opening of the opinion the provisions from the laws of Tennessee under which the case was decided. After specifying in what cases an attachment may be sued out, subsequent sections of the code provide for publication for a fixed time in a newspaper published in the county where the suit is brought, of a memorandum or notice of the attachment, and declares:

> "This memorandum or notice shall contain the names of the parties, the style of the court to which the attachment is made returnable, the cause alleged for suing it out, and the time and place at which the defendant is required to appear and defend the attachment suit." (Sec. 3522).

> "The attachment and publication are in lieu of personal service upon the defendant, and the plaintiff may proceed upon the return of the attachment duly levied, as if the suit had been commenced by summons." (Sec. 3524).

It will be noted from the foregoing that the levy of the attachment is made the method of summoning the defendant. Commenting thereon, the Court says that "In this class of cases * * * the seizure of the property is the one essential requisite to jurisdiction, as it unquestionably is in a proceeding purely *in rem*."

Now there is nothing analogous to this in the laws of Oregon. There is no provision for beginning a suit

by attachment of property, nor for publishing a notice of such attachment, and especially there is no provision that "the attachment and publication are in lieu of personal service upon the defendant and the plaintiff may proceed upon the return of the *attachment duly levied* as if the suit had been commenced by summons," which is the identical language of Sec. 3524 of the Tennesee code.

The Court goes on to say in the course of the opinion:

> "We do not deny that there are cases * * * in which the Legislature has properly made the jurisdiction to depend on the publication of notice, or on bringing the suit to the notice of the party in some other mode, when he is not within the territorial jurisdiction."

Our contention is that the Legislature of Oregon has done this very thing and beyond doubt the Oregon courts have always so construed the legislative enactment. The method of calling in the defendant in a divorce suit, for instance, is precisely the same in Oregon as in an attachment action.

We comment briefly on some of the cases cited by appellant.

Matthews v. Densmore, 109 U. S., 216, and Erstein v. Rothschild, 22 Fed., 61, as shown by the appellant's quotation therefrom, discuss only the question of defects in the affidavits leading to the writ of attachment, which are everywhere held to be immaterial so far as obtaining jurisdiction of the defendant is concerned, *when the*

writ is ancillary only. Such is the holding in Bank of Colfax v. Richardson. On the contrary, in those states where the writ of attachment is the process employed to obtain jurisdiction to render judgment, the holdings respecting the affidavit for the writ are that it is absolutely essential.

Bigelow v. Chatterton, 51 Fed., 614, might appear from the extract in the brief of appellant's counsel to be fully in accord with the most extreme position of Cooper v. Reynolds; but an examination of the case discloses that all that is said along this line is dictum, for it appears that there was a summons regularly served. There had originally been a defect in the proof of publication, which the trial court had permitted to be cured by an amendment. The allowance of the amendment is held to have been proper, and it is said (page 618), "Thereupon an affidavit of proof of publication of the summons was filed, which conformed in all respects to the requirements of the statute." There was, therefore, a due and proper service of the summons by publication, and the case never involved the question of validity of a judgment where no such service had been authorized or made.

Moreover, the Court seems to treat this showing of due service of summons by publication as an essential part in the acquisition of jurisdiction by the attachment, as Your Honors will note from the opening words of the decision as quoted on page 25 of appellant's brief herein.

Passing to the other cases cited by appellant on this point, we find that neither Southern Bank & Trust Com-

pany v. Folsom, 75 Fed., 929, nor Heid v. Ebner, 133 Fed., 156, involved any question of service of process on the defendant; and the same is true of Holmes v. Oregon & California Railroad Company, 9 Fed., 229, which, by the way, has long since been overruled on the only point it did decide. Phoenix Bridge Co. v. Castleberry, 131 Fed., 177.

National Nickle Company v. Nevada Nickle Syndicate, 112 Fed., 44, which is cited by counsel as "sustaining a judgment upon an insufficient publication," does not in fact involve any judgment on publication of service. The parties had all appeared personally and contested the suit. It was sought to attack the order of confirmation of sale from which no appeal had been taken.

Graff v. Lewis, 71 Fed., 591, was another case involving irregularities in the affidavit on which the writ of attachment was procured; and it holds, as does the Supreme Court of Oregon and almost every court before which the question has come, that such irregularities do not avail on collateral attack. Instead of being a case "very much like the case at bar," it has no resemblance to the case at bar; for so far as appears all the proceedings relating to the summoning of the defendant were perfectly regular.

In closing the discussion respecting Cooper v. Reynolds and the conclusions sought to be drawn therefrom, quotations *in extenso* from two decisions of the United States Supreme Court are given below, which explain and modify the doctrines of the earlier cases to such a

degree that it ceases to maintain any doctrine helpful to the appellant here. We claim for these decisions that they totally wipe out the impression which a superficial reading of Cooper v. Reynolds might create, that proceedings *quasi in rem,* like the one here, are so purely against the thing that no notice is required to give the court jurisdiction. These later cases, and many more in the same line cited at the close of this brief, establish the opposite doctrine.

We quote from Windsor v. McVeigh, 93 U. S., 279:

> "A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit *in rem* only brings the property seized within the custody of the court, and informs the owner of that fact. The theory of the law is that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon the question after opportunity has been afforded its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within

which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation or publication in some other form. The manner of notification is immaterial, but the notification itself is indispensible.

"In Woodruff v. Taylor, 20 Vt., 65, the subject of proceedings *in rem* in our courts is elaborately considered by the Supreme Court of Vermont. After stating that in such cases notice is given to the whole world, but that from its nature it is to the greater part of the world constructive only, and mentioning the manner in which such notice is given in cases of seizure for violation of the revenue laws, by publication of the substance of the libel with the order of the court thereon specifying the time and place of trial, and by proclamation for all persons interested to appear and contest the forfeiture claimed, the court observed, that in every court and in all countries where judgments were respected, notice of some kind was given, and that it was just as material to the validity of a judgment *in rem* that constructive notice at least should appear to have been given as that actual notice shall appear upon the record of a judgment *in personam*. "A proceeding," continued the court, "professing to determine the right of property, where no notice, written or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court." * * * The doctrine invoked by counsel, that, where

a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments."

We quote also from Guaranty Trust Co. v. Green Cove Railroad, 139 U. S., 146:

"It is claimed, however, that as the proceeding to foreclose this deed was *in rem,* the seizure of the property proceeded against was the foundation of the jurisdiction of the court, and that a defective publication of notice, though it might reverse a judgment in such a case for error in departing from the directions of the statute, does not render such a judgment, or the subsequent proceedings, void; and the case of Cooper v. Reynolds, 10 Wall., 308, is relied upon in support of this position. * * * The case of Cooper v. Reynolds was one where the property was seized by virtue of an attachment taken out at the commencement of the suit in which the proceedings to call in the non-resident defendant were had,

and the record asserted that "publication has been made according to law." Indeed, Mr. Justice Miller said in that case, p. 319, "We do not deny that there are cases * * * in which the legislature has properly made the jurisdiction to depend on this publication of notice, or on bringing the suit to the notice of the party in some other mode, when he is not within the territorial jurisdiction." It was said by Mr. Justice Wayne, in Williamson v. Berry, 8 How., 495, 540, in reply to an argument that a decree in chancery could not be looked into in a collateral way, that "it is an equally well-settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings. The rule prevails whether the decree of judgment has been given in a court of admiralty, chancery, ecclesiastical court or court of common law." The decisions of this court upon this subject, beginning in the year 1794 with the case of The Betsey, 3 Dall., 6, have been uniform and consistent. The following are a few of the leading cases upon this subject: Rose v. Himely, 4 Cranch, 241; Elliott v. Piersol, 1 Pet., 328; Wilcox v. Jackson, 13 Pet., 498; Shriver's Lessee v. Lynn, 2 How., 43; Lessee of Hickey v. Stewart, 3 How., 750; Webster v. Reid, 11 How., 437. In the last case it was held that where jurisdiction had been sought to be obtained by publication, as in this case, it was necessary to show that notice had been given by pub-

lication as the act required. "If jurisdiction," says, essential to show that all its requisites had been substantially observed. It was necessary for the plaintiff to prove notice, and negative proof that the notice was not given, under such circumstances, could not be rejected." In Hunt v. Wickliffe, 2 Pet., 201, an order was made by a state court of chancery for a non-resident to appear, and that a copy be published "for eight weeks in succession agreeably to law," and it was held that, as the laws of Kentucky only authorized their courts of chancery to make decrees against absent defendants on the publication of an order for two months successively, the order of the court of chancery for a publication for eight weeks was not a compliance with the law, the supreme court of Kentucky having decided that the publication must be continued for two calendar months. Under this construction of the act, the decree was made against persons who were not parties to the suit, and it was held that it could not affect them. So in Galpin v. Page, 18 Wall., 350, it was held that when by legislation of a State constructive service of process by publication is substituted in place of personal service, the statutory provision must be strictly pursued in order to bind a claim of another state not personally served. "Whenever," says Mr. Justice Field, "it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach

of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. * * * When, therefore, by legislation of a state, constructive service of process by publication is submitted in place of personal citation, * * * every principle of justice exacts a strict and liberal compliance with the statutory provisions." pp. 368, 369. Later cases to the same effect are Earle v. McVeigh, 91 U. S., 503; Settlemier v. Sullivan, 97 U. S., 444; Cheeley v. Clayton, 110 U. S., 701; Applegate v. Lexington &c. Mining Co., 117 U. S., 255; and there is scarcely a state in the Union in which the same principle has not been announced and reaffirmed."

It is clear that the question whether the Federal court shall entertain a suit to quiet title which may involve the validity of the judgment of a State court (assuming the *situs* of the property and citizenship of the parties to be proper) is not in any sense a jurisdictional one, save as the existence of a plain remedy at law may in a particular instance influence the Court to refuse to act. To a certain extent it is perhaps a question of comity. As much is indicated by the extract from Mr. Street's work on Equity Practice, given on page 18 of appellant's brief. It is said in Mast v. Stover Mfg. Co., 177 U. S., 488, that "comity is not a rule of law, but one of practice, convenience and expediency. * * * Its obligation is not imperative."

We do not believe there is any question of comity here. There is no suggestion of a remedy in the state court which ought to supplant the right of the plaintiff to resort to equity. Even if there were a remedy at law, or some remedy in the state court, the appellant has waived any right to raise this point.

Provided the matter is in the general scope of equity jurisdiction, an objection that an action should have been brought at law instead of in equity is waived by a failure to take advantage of it at the proper time, and if the defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law.

Beyer v. LeFevre, 186 U. S., 114; 22 S. Ct., 767.

Perego v. Dodge, 163 U. S., 160-164.

Insley v. United States, 150 U. S., 512.

Brown v. Lake Superior Iron Co., 134 U. S., 530.

Reynes v. Dumont, 130 U. S., 354, 395.

Toledo Computing Scale Co. v. Comp. Scale Co., 142 Fed., 923.

Green v. Turner, 98 Fed., 756.

Security Co. v. Baker County, 33 Or., 338; 54 Pac., 174.

In Security Co. v. Baker County, 33 Or., 338, in which the opinion was delivered by Mr. Justice Wolverton, it is said:

"A question was made at the argument, and is somewhat insisted upon in the brief, that a court of equity is without jurisdiction to entertain the cause of suit set forth by the complaint, because plaintiff has an adequate remedy at law; but the defendants have themselves, by their answer, sought and demanded equitable relief, which precludes them from raising the question." Kitcherside v. Meyers, 10 Ore., 21; O'Hara v. Parker, 27 Ore., 156. (39 Pac., 1004).

By answering to the merits, and *a fortiori* by filing a cross-bill submitting his title to the jurisdiction of the court and praying for affirmative relief, the appellant has waived any possible objection he might otherwise have urged against the action of the court in taking jurisdiction of the cause. It has frequently and uniformly been so held, where the citizenship of the parties was such that the Federal court would not have had jurisdiction but for such waiver.

Central Tr. Co. v. McGeorge, 151 U. S., 129, 132; 14 S. Ct., 286.

Ex Parte Schollenberger, 96 U. S., 369, 378.

St. Louis Ry. v. McBride, 141 U. S., 127.

Texas & Pac. Ry. Co. v. Saunders, 151 U. S., 105.

Western Loan v. Butte, 210 U. S., 368; 28 S. Ct., 720, 721.

Gregory v. Pike, 67 Fed., 837.

Barnes v. Western Union, 120 Fed., 550, 555.

Baltimore & Ohio R. R. v. Doty, 133 Fed., 866.

Wolff & Co. v. Choctaw Ry. Co., 133 Fed., 601.

Dalles v. Crippen Mfg. Co., 156 Fed., 706, 708.

Texas Co. v. Central Fuel Oil Co., 194 Fed., 1.

Respecting the claim that defendant in some way occupies the position of a *bona fide* purchaser, we think it may be sufficient to say, if anything needs to be said, that no defense of this character is pleaded. The rule is settled that a defendant who would avail himself of the defense of *bona fide* purchase must allege and prove the facts constituting such defense. The leading case on the subject is Boone v. Childs, 10 Peters, 177, in which the essentials of such a plea are set forth. See also Daniels' Chancery Pleading & Practice, 4 Am. Ed., Sections 671, 672.

The Oregon cases on the point are numerous, the one most often quoted being Hyland v. Hyland, 19 Ore., 51.

In Jennings v. Lentz, 50 Ore., 483, it is held that one cannot be a *bona fide* purchaser under an attachment, where the apparent title was not in the defendant at the time of the attachment.

We were also met with the contention in the lower court, which may possibly be renewed at the oral argument, that the courts should not take jurisdiction because the plaintiff had a remedy at law by action in ejectment under Sections 326 and 327, Lord's Oregon Laws.

Your Honors are so familiar with the rule and the practice of the Oregon courts under the statute in question that no argument is needed. A reference to some of the reported cases may be convenient:

Morrison v. Holladay, 27 Ore., 175.

McLeod v. Lloyd, 43 Ore., 260.

SUFFICIENCY OF THE AFFIDAVITS.

In view of our array of authorities on the subject, against which no showing whatever is made, the appellant can scarcely contend that the so-called affidavit taken outside of the state is anything but a nullity. However, it is claimed that the affidavits of Coshow and Evelyn Johnson are sufficient. We say these affidavits have no tendency to prove at all the absolutely essential facts that the defendants could not, with due diligence, have been found in the State of Oregon, or that they had property therein. We have set them out in full at page 4 and page 5 of this brief.

If these affidavits tended to prove said jurisdictional facts, we admit that they would be sufficient in collateral proceedings, as is held in George v. Nowlan, 38 Ore., 537; 64 Pac., 1; and in Marx v. Ebner. The affidavit of Evelyn Johnson, shown at page 93 of the printed transcript, is merely an affidavit of mailing copies of summons and complaint to the defendants, at given addresses, without stating that these addresses are the addresses of the defendants, or that either of them was, or within the past twenty years had been there. The first affidavit of Mr. Coshow, shown at page 83 of the

printed transcript, refers only to an inquiry he has made, from ta party outside the State of Oregon, who has inquired of still other parties outside the State of Oregon, as to the postoffice address of the defendants, without a word of reference to diligence to find the defendants in the State of Oregon. It does not state even as a conclusion of law, or by any inference, that any attempt had been made to find the defendants in the State of Oregon.

The second affidavit of Mr. Coshow, shown at page 92 of the printed transcript, refers to the same thing—inquiries outside the State of Oregon as to the postoffice address of the defendants; not a word as to whether they were to be found in the State of Oregon, nor as to diligence to ascertain this fact.

The Sheriff's return, "Not Found," refers to his county only and is not carried into any of the affidavits, by reference or otherwise, and it is to be borne in mind that the requisite showing can be made by affidavit only.

The law of Oregon has stood for 25 years as it is laid down in Pike v. Kennedy, 15 Ore., 425; 15 Pac., 637; McDonald v. Cooper, 32 Fed., 745. We quote from the latter:

> "That diligence has been used to find the defendant within the state must appear from the affidavit, and a mere statement or assertion therein that the party is a non-resident thereof is not sufficient. Nor is such statement or assertion that diligence has been used, a compliance with the statute. The affidavit must contain some evidence of the ultimate fact, be-

sides the assertion of the affiant, on which the judicial mind may act in granting the order. And however slight and inconclusive this evidence may be, if it had a legal tendency to prove the diligence, and that the defendant could not be found in the state, it is sufficient to give the court jurisdiction, and sustain the order against a collateral attack. But where there is no evidence of such diligence except the bald assertion of the fact, or that of non-residence, the order is void, and the Court does not acquire jurisdiction. Rickertson v. Richardson, 26 Cal., 153; Forbes v. Hyde, 31 Cal., 350; Carleton v. Carleton, 85 N. Y., 314; Neff v. Pennoyer, 3 Sawy., 288.

This was a case of collateral attack, and the judgment was held void.

Your Honors recently had the same question before you in the case of Cohen v. Portland Lodge No. 142, reported in 152 Fed., 357, in which the following language is used:

"We proceed, therefore, to ascertain what the affidavit must contain, and then whether upon its face it shows a want of jurisdiction in the court that rendered the decree. The statute requires that both non-residence and absence must exist and both must appear to the satisfaction of the court before the court can grant an order that service shall be made by publication; and there must always be a showing by affidavit that due diligence has been used to find the defendant within the state. So we have three matters material to the ultimate point involved in our

inquiry, each of which must have been made to appear to the state court before the order could have been proper. First, it must have appeared that diligence had been used to find the defendant in the state; second, it must have appeared that defendant could not be found within the state after a diligent search; and, third, it must have appeared that defendant was not a resident of the state when the order was applied for. The purpose of the statute, requiring a diligent search as a prerequisite to the consideration of the matter of absence and non-residence, is obviously to allow no departure from the ordinary methods of service upon the person by delivery of process as prescribed, unless absence and non-residence make a substitute service permissible."

It is just as requisite that the affidavit shall show that "the defendant has property within the state" as it is to show "that he cannot after due diligence be found." L. O. L., 856; Colburn v. Barrett, 21 Ore., 27; McDonald v. Cooper, 37 Fed., 750.

We quote from the Oregon case just cited (p. 29):

"The result is, that the affidavit nowhere discloses that the defendants have any property in this state. There is not even a bare assertion to that effect, nor is the property specified. No principle is better settled than that the requirements of the statute in cases of this sort must be complied with when service by publication is sought to be had on absent defendants. 'When,' said Mr. Justice Field, 'constructive service of process by publication is substi-

tuted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent defendant not a citizen of the state, nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions.' (Galpin v. Page, 18 Wall., 350). The affidavit is certainly fatally defective in the particulars noted, and the order based upon it cannot be sustained. It results, then, that the court did not acquire jurisdiction of the appellants, and that its judgment or decree as against them is void."

In Howard v. DeCordova, 177 U. S., 614; 20 S. C. R., 819, it is said, in a case of collateral attack on the judgment of a state court, that:

"The controversy turned on whether Newell could be heard in the Circuit Court of the United States to attack the judgment of the State court, it being contended that the fact that Newell was represented by an attorney at law who presented and filed an answer in his name was conclusively established by the judgment, which could not be assailed collaterally in the court of the United States, however much it might be subject to direct attack for fraud in the courts of the State of Texas. The contention was not maintained, it being decided that, as the charges went to the jurisdiction of the state court, such question of jurisdiction could be examined in the courts of the United States whenever the judgment of the state court was presented as a muniment of title. * * * The affidavit by the plaintiff or his attorney as to the want of knowledge of the

names of the parties defendant, or their residences, is made an essential prerequisite of the jurisdiction of the court to issue an order for publication. In other words, a summons by publication could only take place when the essential affidavit is previously made. In the state court, therefore, the affidavit was jurisdictional in its character."

The vice of appellant's argument lies in the refusal to recognize a difference between informalities and defects in the affidavit, and a total lack of any showing on some vital point. He therefore cites a mass of cases holding that judgments will not be set aside on collateral attack for such informalities, — a proposition that we would have conceded to him without argument, — and because the necessity of his case requires it, he ignores that equally abundant line of authorities holding that where there is a total lack of such showing respecting some vital point required to be shown in the affidavit, the court is without jurisdiction to proceed.

On page 42 of his brief appellant implies that the Oregon Court may have had before it other evidence than the record now shows as the basis for the order of publication. The record is certified by the Clerk and stipulated by the parties to be complete. See page 68 of the printed transcript. Nor will presumptions of this character be indulged, as is shown by authorities we have cited in that respect.

Appellant is mightily mistaken in the assumption expressed in his brief at page 45, that it is conceded that if the affidavit was correct in all essential points

the title of the property is in him. We are contesting the case as earnestly on the lack of a valid attachment, as on the lack of a proper affidavit.

The theory that the appellant, by his attachment made April 1, acquired a lien on the title which eleven days afterward vested in Aaron momentarily, and the way in which this theory is reasoned out, is ingenious and amusing. It is to be noted in the first place that the Sheriff never made any attachment on the land. Section 300 L. O. L. directs how an attachment shall be made. The material part is as follows:

> "1. Real property shall be attached as follows: The Sheriff shall make a certificate containing the title of the cause, the names of the parties to the action, a description of such real property, and a statement that the same has been attached at the suit of the plaintiff; and deliver the same to the county clerk of the county in which the attached real estate is situated."

It will be noted that the appellant attempted to attach, not the land, but the interest of the defendant therein. (See Sheriff's return of the writ, at page 75 of the printed transcript). The defendants on that day had no interest in the land and the attachment caught nothing. That it was like a bear-trap standing set, ready to grab any interest that might in the future vest in the defendants, will hardly be accepted as a valid proposition of law.

The theory that the attaching creditor occupies a position as favorable with respect to the acquisition of

an after vesting title as that of a purchaser in a bargain and sale deed, is absurd. Such deeds have the effect of passing the after-acquired title on the basis of estoppel against the grantor because he has therein affirmed himself, by the execution of the deed, to be seized of the land. Such an element of estoppel is totally lacking here.

In closing, we ask the Court to note that many cases cited by appellant show that the Federal courts do assume jurisdiction of cases brought to set aside on collateral attack titles resting on judgments of the state courts, and that, too, notwithstanding jurisdiction of the *res;* so that appellant's two main points go down before his own authorities. In addition to those which appellant cites, every one of the following is a case where such jurisdiction was assumed, and the list ought to be a full answer to appellant's contention respecting Cooper v. Reynolds:

Thatcher v. Powell, 6 Wheaton, 119.

Pennoyer v. Neff, 95 U. S., 714.

Newman v. Crowls, 60 Fed., 220.

Settlemier v. Sullivan, 97 U. S., 444.

Guaranty Trust Co. v. Green Cove R. Co., 139 U. S., 137.

Earle v. McVeigh, 91 U. S., 503.

Cheely v. Clayton, 110 U. S., 701.

Ritchie v. Sayers, 100 Fed., 520.

Meyer v. Kuhn, 65 Fed., 705.

Phoenix Bridge Co. v. Castleberry, 131 Fed., 179.

Simon v. Southern Ry. Co., 195 Fed., 56.

Swift v. Meyers, 37 Fed., 36.

Cissell v. Pulaski, 10 Fed., 891.

Hatch v. Ferguson, 57 Fed., 970.

A suit to foreclose a lien or remove a cloud is just as much a suit *in rem* as is an attachment suit. This is fully gone into in Arndt v. Griggs, 134 U. S., 316, and the cases there cited. Therefore the decision in Meyer v. Kuhn, 65 Fed., 705 is in point. The court had jurisdiction of the *res* and yet the decree was held void for a defect in the publication of summons. The point decided in Arndt v. Griggs, namely, that a suit to foreclose a lien is just as much a proceeding *in rem* as is an attachment, is what makes, as it seems to us, the decision in Guaranty Trust Company v. Green Cove R. Co., 139 U. S., 137, precisely in point and decisive of the case at bar.

Respectfully submitted,

JAMES N. DAVIS,

VEAZIE & VEAZIE,

Solicitors for Respondents.